

MISSISSIPPI LAW JOURNAL



Is Haddock Dead?

CHARLES W. TAINTOR, II.

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March, 1943

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Mississippi Law Journal

JOURNAL OF THE MISSISSIPPI STATE BAR

VOLUME XV

MARCH, 1943

NUMBER 3

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Entered as second class matter at the Post Office at University,
Mississippi, November 25, 1936.

Published in November, January, March, May, and September

\$3.00 Per Annum

75 Cents per Current Number

EDITORIAL AND BUSINESS OFFICE, UNIVERSITY, MISSISSIPPI

Mississippi Law Journal

JOURNAL OF THE MISSISSIPPI STATE BAR

VOLUME XV

MARCH, 1943

NUMBER 3

IS HADDOCK DEAD?

Charles W. Taintor, II*

"Haddock v. Haddock is overruled." So spoke Mr. Justice Douglas in *Williams v. North Carolina*¹ in December, 1942. That opinion, the concurring opinion of Mr. Justice Frankfurter, and the dissenting opinions of Mr. Justice Murphy and Mr. Justice Jackson make it clear that the intention of the majority, in this respect, was as sharply defined as literal interpretation of the naked words quoted could indicate.

It is not, however, clear that the intention of the court was to overrule, if that be possible, the dicta in *Haddock v. Haddock*,² or to approve or disapprove of the various interpretations of and speculations on the *Haddock* case which have been set out by many writers.³ For that reason it is advisable, first, to examine the interrelation between divorce decrees and the "due process" and "full faith and credit" clauses before *Haddock's Case* was decided; second, to examine that interrelation during the years between *Haddock's Case* and *Williams's Case*; and, third, to analyze the effect of the latter in this field.

I.

Before Haddock

It must be assumed that if a divorce decree is rendered in one State without due process of law, it is of no effect in that State and cannot be given effect in other States.⁴ To what extent "due process of law" includes both *procedural* and *substantive* due process is a more difficult question. At least three different views as to the nature of an action for

*Professor of Law, University of Pittsburgh. B.A., 1918, LL.B., 1935, LL.M., 1936, S.J.D., 1939, Harvard. Co-editor Harper & Taintor, *Cases on Conflict of Laws* (1937), and author of articles in various legal periodicals.

¹63 S. Ct. 207 (U. S. 1942).

²201 U. S. 562 (1906).

³Among these are: Beale, *CONFLICT OF LAWS*, §§ 113.10, .11, .12; Goodrich, *CONFLICT OF LAWS*, § 128; Stumberg, *CONFLICT OF LAWS*, p. 273, *et seq.*, [Hereinafter the above texts will be cited "Beale," "Goodrich," "Stumberg"]; Beale, *Constitutional Protection of Decrees for Divorce* (1906) 19 HARV. L. REV. 586; Beale, *Haddock Revisited* (1926) 39 *id.* 417; Bingham, *THE AMERICAN LAW INSTITUTE vs. THE SUPREME COURT, In the Matter of Haddock v. Haddock* (1936) 21 CORN. L. Q. 393; McClintock, *Fault as an Element of Divorce Jurisdiction* (1928) 37 Y. L. J. 564; Strahorn, *A Rationale of the Haddock Case* (1938) 32 ILL. L. REV. 796.

⁴See *Williams v. North Carolina*, 63 S. Ct. 207, 217 (U. S. 1942) (*per* Mr. Justice Frankfurter).

divorce seem to have been held in the states living under the common law.⁵ Courts sometimes approach the problem through analysis of the nature of marriage. In such cases the emphasis is upon the interest of the state in the institution of marriage and the decisive element is deemed to be jurisdiction of the *res*.⁶ Other courts seem to approach the problem through consideration of the personal interest of the spouses in the marriage. In such cases the emphasis is upon proper notice and a fair opportunity to defend,⁷ though the presence of jurisdiction of the *res* in the forum seems also to be required.⁸

That at all times the Supreme Court has had some notion of the reification of marriage clear. In all the cases in which full faith and credit to a foreign divorce decree has been compelled, or a denial of recognition allowed to another State, the emphasis has been upon jurisdiction of the *status*. No State has been compelled to give full faith and credit unless at least one of the spouses was domiciled in the State whose court rendered the decree. This was decided in a case in which the respondent entered an appearance in the case,⁹ and, *a fortiori*, where there was neither local service of process nor appearance.¹⁰ On the other hand, full faith and credit were compelled where the petitioner was domiciled at the forum, which was the last State in which the parties had been domiciled as husband and wife;¹¹ where the petitioner, the wife, was domiciled at the forum, a State in which the parties had never been domiciled as husband and wife, and where there was no evidence of petitioner's fault;¹² and, where the husband, having deserted his wife, obtained a legislative divorce in the State of his domicile, in which the parties had never been domiciled as husband and wife, the opinion makes it clear that the court's notion was that the divorce had completely destroyed the marriage.¹³

⁵See Stumberg, pp. 270-272.

⁶Ditson v. Ditson, 4 R. I. 87 (1856).

⁷People v. Baker, 76 N. Y. 78 (1879); Irby v. Wilson, 21 N. C. 568 (1837); McCreery v. Davis, 44 S. C. 195, 22 S. E. 178 (1895).

⁸Cf. Felt v. Felt, 59 N. J. Eq. 606, 45 Atl. 105 (1899); Gould v. Gould, 235 N. Y. 14, 138 N. E. 490 (1923); Beale, § 113.11 (speaks of the "novel decision of Gould v. Gould."

⁹Andrews v. Andrews, 188 U. S. 14 (1903).

¹⁰Bell v. Bell, 181 U. S. 175 (1901).

¹¹Atherton v. Atherton, 181 U. S. 155 (1901).

¹²Cheever v. Wilson, 9 Wall. 108 (U. S. 1869).

¹³Maynard v. Hill, 125 U. S. 190 (1887).

The actual decision was that the divorce was effective to destroy the wife's marital rights in land situated in the divorcing State. It may be maintained, as has been contended by some of the commentators, that this case does not go beyond its actual decision and may be treated as authority only for the local validity of divorces granted at the domicile of the petitioner. An examination of the opinion, however, makes it appear that the court was of the opinion that the respondent was divorced, *simpliciter*.

Mr. Justice Field spoke of the legislative act as one, "divorcing the husband and wife"; and said, "After the divorce she had no such relation to him . . .", and, "A wife divorced has no right of dower", and, "To entitle her . . . she must have continued his wife". There is no suggestion of a notion that she remained a "wife" for any purpose, or at any place. It is clear that the thought was that she had been "divorced".

Inasmuch as the Supreme Court, in this period, held that the husband's divorce, obtained at his and the last matrimonial domicile,¹⁴ and that the innocent wife's divorce, obtained at her domicile which was neither the husband's nor the last matrimonial domicile, were entitled to full faith and credit, it seems safe to conclude that, during this period, the domicile of the innocent spouse, or the domicile of either spouse if it was also the last matrimonial domicile, had constitutional power to dissolve the marriage for all purposes and for all States. Moreover, for reasons given in Note 13, *supra*, it seems probable that in 1887, and for some time thereafter before the decision in *Haddock v. Haddock*, the guilty husband could obtain at his domicile a divorce which was valid in all States.

Whether the guilty wife could get a divorce at her domicile, which was not the last matrimonial domicile may have been more doubtful. Some courts reached the conclusion, for purposes other than divorce, that a wife who deserted her husband was capable of acquiring an independent domicile,¹⁵ but it is clear that the general opinion at that time was that the domicile of the wife was that of the husband unless he had wronged her to such an extent that she could leave him without being guilty of desertion.¹⁶ It seems probable, then, that a guilty wife could not get a valid divorce, except at her husband's domicile.

To that extent, fault was a jurisdictional fact which could be re-examined in any State in which full faith and credit was demanded. It is to be noted, however, that this statement contains no suggestion that fault plus domicile denied jurisdiction. The suggestion is that fault in the wife denied domicile in her, and that domicile was a jurisdictional fact which could be re-examined.

II

From Haddock to Williams

Opinion about the change in the requirements of full faith and credit to divorce decrees worked by *Haddock v. Haddock* was and is far from unanimous. Mr. Justice White, who wrote the majority opinion, did not say what the Supreme Court thought was the effect of the decision. Beale, Bingham, McClintock, and Strahorn, have offered rationales of the *Haddock* case, each discovering a different basis.¹⁷ At the risk of over-

¹⁴Though, because of its ambiguity when used in various connections, the locution "matrimonial domicile" has been criticized, I shall use it, following the usage of courts and writers, to mean "the state in which the spouses are, or were, domiciled together as parties to a going marriage".

¹⁵Beale, § 28.5.

¹⁶*Id.*, § 28.3, 4: Goodrich, § 33; Stumberg § 38-42.

¹⁷These will be found in the articles cited in Note 3, *supra*.

The facts in the *Haddock* case were as follows: The Haddocks were domiciled in New York as husband and wife. Haddock changed domicile to Connecticut, his wife staying in New York. He got a decree for divorce *a vinculo matrimonii* in Connecticut, on substituted service of process. Later, Mrs. Haddock sued in New York for divorce *a mensa et thoro* and for alimony and had a decree, which was affirmed by the Court of Appeal of New York. Haddock appealed to the Supreme Court on the ground that the New York court was compelled to give full faith and credit to the Connecticut decree. The Supreme Court affirmed the New York decree.

simplification with its consequent danger of mis-representation, I shall summarize, very briefly, each of these rationales.

Beale's considered opinion,¹⁸ published twenty years after the *Haddock* decision, was that the problem is one of jurisdiction to decree divorce, and that jurisdiction depends upon domicile plus (1) the consent of the other spouse that the marriage *status* be subject to the decree of the forum, a consent demonstrated by a voluntary appearance, by consent to the living apart of the spouses; or plus (2) such misconduct as to justify the acquisition of a separate home. He notes the evil results that may follow in cases where the court of the divorcing State and of that State in which recognition of the decree may be demanded make contradictory findings on the jurisdictional facts; but feels that this situation is better than the alternative. This even less desirable alternative he sees in the certainty that, without the *Haddock* limitation, two spouses will be married in one State and divorced in another, and leans upon the consideration that, if the second court should find the jurisdictional facts differently, there will always be the possibility of appeal to the Supreme Court. Moreover, the *Haddock* formula merely puts the husband on the same footing as the wife. In the earlier days it would have been necessary for the Court to have decided the fact of fault, in all cases in which the wife sued in some State other than the last matrimonial domicile or the actual domicile of both spouses. After *Haddock*, the same determination became necessary where the husband sued under the same circumstances. Finally, he finds in the *Haddock* formula a compromise upon which more States can agree and which will reduce the odious cases in which a person will be married in some States and not in others, or married in some States and living in adulterous bigamy in others.

Bingham, on the other hand,¹⁹ sees marriage as made up of multiple incidents which can be affected independently of each other by a decree of divorce, all but one of these incidents subject to the control of the domicile of each spouse through its control of the status of the domiciled spouse. Thus, if the husband, domiciled in State X, obtains there a decree of divorce from his wife, domiciled in State Y, his capacity to marry has been restored by X, while that of the wife need not have been restored by Y, unless the decree is entitled to full faith and credit. Likewise, each of the domiciliary States has the power to determine marital property rights as to property within its boundaries. Moreover, the marriage relation continues, despite the divorce to the extent that the domicile of the wife can protect her continuing economic interests, in so far as it has jurisdiction of the husband's property or person. It must be noted, however, that our system of monogamy requires that the decree shall have termi-

¹⁸*Haddock Revisited*, (1926) 39 HARV. L. REV. 417. Beale's conclusions were adopted by the American Law Institute. RESTATEMENT, CONFLICT OF LAWS (1934) § 113.

¹⁹THE AMERICAN LAW INSTITUTE vs. THE SUPREME COURT, In the Matter of *Haddock v. Haddock* (1936) 21 CORN. L. Q. 393.

nated the incident of marital intercourse and social life.²⁰ The *Haddock* case, for Bingham, seems more important in its dicta than its decision, the dicta to the effect that the divorce might be valid in Connecticut.

McClintock sees²¹ in the *Haddock* case, a decision which puts the wife and husband on the same footing for divorce; fault is a jurisdictional fact in either case. He decries the notion of a fictional consent of the guilty spouse that the other spouse submit the marriage to the jurisdiction of his or her after-selected domicile, and maintains that a proper balancing of the interests may impel us to recognition of the power of that selected domicile, without the use of any fiction. He sees little or no benefit in the addition of fault as a jurisdictional element: first, because the Supreme Court would have to determine fault, either by conflicting State rules, or by the application of the "general law" of marriage; second, because our ideas of permissible or desirable divorces will probably change more quickly than the notion of fault sufficient to justify change of domicile for divorce purposes; and third, because in many cases fault would have to be determined after the death of one or both spouses, when the sole evidence available would be the public conduct of the spouses, and knowledge of the first commission of public fault would not often mean knowledge of factual responsibility for the failure of the marriage.²²

Strahorn finds²³ the *Haddock* case an example of an unusual, but not individual, contrast between factors constituting due process of law and other facts compelling full faith and credit, and points to other situations in which a judgment may be rendered with due process of law but not be entitled to full faith and credit.²⁴ He accepts the dicta to the effect that certain divorces, among others, Haddock's, can be given local validity and voluntary foreign recognition, but are not entitled to compulsory recognition; and makes the *Haddock* case turn on procedural due process. One determining factor is feasibility of defending the suit, feasibility demonstrated by presence for service of process in the State of the

²⁰It is difficult to understand how a divorce which is not entitled to full faith and credit can have terminated any incident. It seems that if the wife were still married to the husband for any purposes of the power of her domicile, then in that State her rights and duties of marital and social intercourse would persist.

²¹*Fault as an Element of Divorce Jurisdiction* (1928) 37 Y. L. J. 564.

²²Another difficulty which McClintock does not mention may be found in the different attitudes of various States toward the defense of recrimination and in the almost certainly coming laws allowing divorce without fault, but, by mutual consent alone.

²³*A Rationale of the Haddock Case* (1938) 32 ILL. L. REV. 796. See also, by the same author, *The Supreme Court Revisits Haddock* (1938) 33 ILL. L. REV. 412 (discussing the *Davis* and *Hellmuth* cases, which I discuss in the text, *infra* pp.)

²⁴See Strahorn, *A Rationale of the Haddock Case* (1938) 32 ILL. L. REV. 796, 809. The reference is to a State's refusal to "provide a court" for two foreign corporations [*Anglo-American Provision Co. v. Davis Provision Co.*, 191 U. S. 373 (1903)] and to the exemption of "penal" judgments from full faith and credit. *Huntington v. Attrill*, 146 U. S. 657 (1892).

forum,²⁵ by voluntary appearance in the actual suit,²⁶ by voluntary departure from the last matrimonial domicile.²⁷ He notes that the fact of fault has no connection with feasibility of defense, but argues that respondent's fault, plus petitioner's desire for divorce show a marriage which has hopelessly failed and should be dissolved. He also suggests that respondent's fault may reasonably be said to amount to assumption of the risk of having to defend a divorce action in any State.²⁸ Another factor is the danger of fraudulent divorce, a danger which is to some extent diminished if the suit is tried in a State with which both parties have had a connection, the last matrimonial domicile.

In the interest of fairness to both parties, and because of the interest of the State of domicile of the petitioner, he appears to welcome the possibility of a man validly married to two different women in different States at the same time and to believe that this is the product of a more realistic analysis than Bingham's.

²⁵It may be permissible to doubt the reality of this demonstration. Validity of service of process on the person depends only on his or her physical presence at the moment of service and this presence might be purely fortuitous and momentary, and upon travels undertaken only under pressure of circumstance. The respondent might, for instance, be acting as companion to, or trained nurse for, an employer who travelled widely. I do not suggest that this is a probability, this pressure of circumstance; but do suggest that realism can not properly overlook the possibility.

²⁶It seems more than permissible to doubt the reality of this demonstration, and to suggest that a voluntary appearance without contest on the merits or on the jurisdictional facts is at least as likely to show a desire that the divorce be granted and compliance with the advice of some lawyer that the decree will thus become entitled to full faith and credit.

²⁷The suggestion is that voluntary departure from the last matrimonial domicile entails no more difficulty than a return thereto. On a realistic basis, even this demonstration is doubtful. Inasmuch as the divorce in this situation is entitled to full faith and credit without re-examination of the fact of fault, it is entirely possible that the departure from the domicile was compelled by the refusal of the other spouse to provide support and a home. In that case the departure would not be voluntary, but its involuntary nature could never be shown without returning to the forum. The argument seems to get into a circle: feasibility of defense is shown by voluntary departure—voluntary departure is shown by non-interposition of defense—non-interposition of defense shows feasibility of defense.

²⁸It may be questioned that this is either a reasonable or a realistic conclusion. The very notion of assumption of risk has a conceptualistic flavor: in the field of torts, where it is most frequently resorted to, it is clearly a method of explaining the non-liability of the employer, and nobody cares whether the injured employee assumed the risk consciously, or not. So here. Does a person commit adultery, expecting to be sued for divorce at all? If he or she does so expect, the case is likely to be one of the factually, but not proven, collusive divorces. Do people consciously assume the risk of a divorce suit in any State to which the other spouse may go, even if they commit the adultery or other fault for the purpose of giving a cause for divorce? Do they not, rather, select the act committed, so that it will be a cause in some particular State, usually that of the matrimonial domicile? Consider the evidence of adultery provided by Atlantic City hotel employees, the comparative proximity of Atlantic City to New York City, and the subsequent New York divorces. Consider the "divorce parties" held in Massachusetts, a State in which physical contact is supposed to be necessary to constitute cruelty—parties at which the husband, in an entirely friendly manner and in the presence of their friends, hits the wife with a golf club, or other blunt instrument.

Since the decision in the *Haddock* case, three important divorce cases have reached the Supreme Court. The first of these, *Thompson v. Thompson*,²⁹ showed that *Atherton v. Atherton*³⁰ had not been overruled by the *Haddock* case, an effect ascribed to the latter by some commentators. In the *Thompson* case, the last matrimonial domicile had been in Virginia; the wife had moved to the District of Columbia and sued for separate maintenance on service of process in the District. Pending the suit in the District, the husband obtained, on service by publication, a divorce *a mensa et thoro* in the court of Virginia. In the wife's suit the husband pleaded the Virginia decree; the Supreme Court of the District rendered a decree for the wife; the Court of Appeals of the District reversed; and, on appeal, the Supreme Court affirmed. This decision makes it clear that the fault element of jurisdiction was not subject to re-examination if the decree was rendered at the last matrimonial domicile, where the petitioner was still domiciled.

The unanimous opinion, by Mr. Justice Pitney, explained the *Haddock* case as follows: The New York court did not violate "the full faith and credit clause in the refusal, and this was because there was not at any time a matrimonial domicile in the State of Connecticut, and therefore the *res*—the marriage status—was not within the sweep of the judicial power of that state."

It is submitted that this is at least some evidence that the dicta in the *Haddock* case, to the effect that the divorce might have local validity, was disapproved.

The second of the three cases was *Davis v. Davis*.³¹ In this case, the husband had obtained a divorce *a mensa et thoro* at the then matrimonial domicile, the District of Columbia, on the ground of cruelty. The decree in this suit, *inter alia*, gave the wife alimony. Later the husband brought suit in Virginia for a divorce *a vinculo matrimonii*; the wife filed a plea, stating that she appeared "specially and for no other purpose than to file this plea to the jurisdiction of the courts" and alleging that the husband's sole purpose in attempting to establish a residence in Virginia was to create jurisdiction in the court to hear the divorce suit, that his residence was not bona fide, and that it was, therefore, a fraud on the court. The court found that the husband had been resident in Virginia for the requisite time and that it had jurisdiction of the subject matter and the parties. It proceeded to grant an absolute divorce to the husband, to divest the wife of all rights in his property, and allowed the wife no alimony. The husband, then, applied to the court of the District to set aside or modify its decree for alimony in such manner as to deny alimony to the wife. In this application he relied on the Virginia decree for divorce *a vinculo matrimonii*. The trial court denied the application. On appeal to the Court

²⁹226 U. S. 551 (1913).

³⁰181 U. S. 155 (1898).

³¹305 U. S. 32 (1938).

of Appeals for the District, it was held that the Virginia decree was not entitled to full faith and credit because the Virginia court "did not have full jurisdiction of the subject matter and the parties."³² The court relied on the *Haddock* case to deny full faith and credit unless the forum was the last matrimonial domicile or the wife appeared or was personally served, and on its holding that the wife's appearance in the Virginia suit was special and did not constitute a waiver of her objection to the jurisdiction.

On *certiorari* the Supreme Court reversed on the ground that the decree of the Virginia court was entitled to full faith and credit and, saying that no question was presented as to the effect of the Virginia decree on the power of the court of the District over alimony, remanded for proceedings in conformity with the opinion.

If this were the last pronouncement of the Supreme Court the case might well call for detailed analysis of the attitude of the court toward the wife's appearance in the Virginia suit. It is difficult to tell whether the court thought that appearance was purely "special" or whether it constituted in some degree an appearance on the merits. Strahorn³³ justly criticizes the court for not making it clear just what kind of an appearance it thought this was and for apparently torturing a "special" into a "general" appearance, and restates his "feasibility of defense" approach to the *Haddock* case.³⁴ It is to be noted, however, that on this issue the Supreme Court cited only *Baldwin v. Iowa State Traveling Men's Assn.*,³⁵ and that in that case the appearance was special, to contest jurisdiction of the defendant, and special only. It may be, then, that the *Davis* case stands for the same doctrine: only one opportunity may be given for contest on jurisdiction—the defendant needs only one day in court to contest jurisdictional facts.

It was noted by the Supreme Court that, on the issue of fault, the wife was concluded by the decree of the court of the District of Columbia in the divorce *a mensa et thoro*, a decree rendered at the then matrimonial domicile and with personal jurisdiction of the wife; that her appearance in the Virginia court to contest domicile concluded her on that point; and that the decree of the Virginia court concluded her on the issue of grounds for divorce *a vinculo matrimonii* under the Virginia law of divorce.³⁶

³²*Davis v. Davis*, 96 F. (2d) 512 (U. S. C. A., D. C., 1938).

³³*The Supreme Court Revisits Haddock* (1938) 33 ILL. L. REV. 412, 415-416.

³⁴See text at notes 23-28, *supra*.

³⁵283 U. S. 522 (1931).

³⁶The indicative rule in divorce cases points, in all common law states, to the divorce law of the forum for ascertainment of the grounds for divorce. RESTATEMENT, CONFLICT OF LAWS (1934) §§ 110, 135; Beale, §§ 110.4, 135.1; Goodrich, § 124; Stumberg, § 267-268. (In order to avoid the possible confusion arising from the various other words used to express the same idea, I use the word "indicative" to express the idea of rules of law which function only to indicate the rules of law which have the effect, once they have been selected, of disposing of the actual case. These latter I

Inasmuch as the wife was bound on the issue of fault justifying a separate domicile, it cannot be said that the *Davis* case disapproved the doctrine for which the *Haddock* case is supposed to stand on this point. There is some slight indication that the Supreme Court was retrogressing to the older notion that a husband can move "matrimonial domicile" around with him, while the wife cannot; but the court may have spoken in terms of a search for the domicile of the husband³⁷ only because of the fact that Virginia could not have divorced the parties without domicile of one of them, and it was clear that only the husband could have been domiciled in that State. This may be shown by the fact that the immediately following paragraph of the opinion is given to a distinction of the *Haddock* case, and that it is there pointed out that there was no suggestion in that case that the wife was at fault.³⁸ My submission is that the *Davis* case stands for the doctrine that in divorce cases, as well as in actions purely *in personam*, the defendant can contest jurisdiction only once. I do not suggest that a naked "appearance", either special or general, will serve as a "contest," but that, if there is a genuine contest the defendant is concluded.

There was no suggestion in the opinion that any divorce could be locally valid, or recognized as valid in other States on the basis of comity, unless the following references to the *Haddock* case carry such an implication:

"He acquired domicile in Connecticut and there obtained absolute divorce."³⁹

"In this case, there exists none of the reasons on which we held the New York court not bound by the full faith and credit clause to enforce in that State the husband's Connecticut divorce."⁴⁰

In the third case, *Hellmuth v. Hellmuth*,⁴¹ the spouse, while domiciled in the District of Columbia, executed a contract which recited separation, abandonment of all intention to resume marital relations, and an agreement to live apart, and provided for separate support for the wife. In the following year the husband became and continued to be a *bona fide*

call "dispositive". I deprecate the use of "conflict of laws rules", "rules of private international law", etc., and of "domestic rules", "local rules", "municipal rules", etc., and have given my reasons at greater length elsewhere. See Taintor, *What Law Governs the Ceremony, Status and Incidents of Marriage* (1939) 19 B. U. L. Rev. 353, 355, n. 7; and Taintor, "Universality" in the *Conflict of Laws* (1939) 1 L. A. L. Rev. 695, 696, nn. 3, 4).

³⁷See *Davis v. Davis*, 305 U. S. 32, 41 (1938).

"It is enough to say that care should always be taken to determine . . . whether . . . it is the domicile of the husband."

Strahorn, *loc. cit.*, *supra*, note 33 (at p. 415) agrees that the case must be treated as one involving independent domiciles of the husband and wife.

³⁸*Davis v. Davis*, 305 U. S. 32 (1938).

³⁹*Ibid.*

⁴⁰*Id.*, 305 U. S. at p. 42.

⁴¹98 F. (2d) 431 (U. S. C. A., D. C., 1938).

resident of Maryland. Three years later, upon service of process by publication only, he got an absolute divorce in Maryland. Two years thereafter, the wife sued for a limited divorce in the District of Columbia, where she continued to live, but the trial court dismissed her bill. The case came before the Court of Appeals for the District solely on her contention that the trial court should have denied full faith and credit to the Maryland decree. The Court of Appeals held, citing its own decision in the *Davis* case,⁴² that, even assuming that the Maryland decree was not entitled to full faith and credit, the trial court had committed no error in dismissing the bill, as the facts presented a case for recognition through comity. The Supreme Court denied *certiorari*,⁴³ without opinion.

Denial of *certiorari* by the Supreme Court, though it cannot be taken as authority, sometimes offers support for only one doctrine. At other times it may offer support for more than one doctrine, and this seems to be one of those times.

Inasmuch as the Court of Appeals of the District of Columbia assumed that the Maryland decree was not entitled to full faith and credit, but was entitled to recognition as a matter of comity,⁴⁴ the denial of *certiorari* may support the conclusion of some of the writers that divorces may have local validity and an optional inter-state validity.

On the other hand, the Court of Appeals reached its decision, "even assuming that the decree of the Maryland court was not entitled to full faith and credit." This assumption was based on the fact that the forum, Maryland, was not the last matrimonial domicile,⁴⁵ and that the wife was not personally subjected to the jurisdiction of the Maryland court by personal service in the State or by appearance and participation in the suit.⁴⁶ The fact that the parties had expressly agreed to live apart may, however, have shown that the conclusion drawn from the *Haddock* case by Beale was correct, and that, in 1938 consent to the acquisition of an independent domicile would have allowed the petitioner to subject the *res* to the jurisdiction of any State to which he might change his domicile.

At the end of the period between *Haddock v. Haddock* and *Williams v. North Carolina* the situation was:

⁴²*Davis v. Davis*, 96 F. (2d) 512 (U. S. C. A., D. C., 1938).

⁴³*Hellmuth v. Hellmuth*, 305 U. S. 497, *rehearing denied*, 305 U. S. 673 (1938).

⁴⁴The public policy leading to this recognition was said to be based on the following facts which showed that there was no possibility of the resumption of the marital relationship: (1) The parties had recognized their incompatibility. (2) They had arranged property rights between themselves; (3) The husband had secured a divorce and had remarried; (4) The wife had sued for a divorce *a mensa et thoro*. Moreover, no interests of children needed to be considered. *Hellmuth v. Hellmuth*, 98 F. (2d) 431, 432 (U. C. S. A., D. C., 1938).

⁴⁵The sole citation was *Atherton v. Atherton*, 181 U. S. 155 (1901).

⁴⁶The sole citation was *Haddock v. Haddock*, 201 U. S. 562 (1906).

Divorces which were valid for all purposes

1. Divorces decreed at the matrimonial domicile or the domicile of both spouses, if the respondent was given procedural due process.⁴⁷
2. Divorces decreed at the last matrimonial domicile which was, also, the domicile of one of the parties, if the respondent was given procedural due process.⁴⁸
3. Divorces decreed at the separate domicile of the innocent spouse, if the respondent was given procedural due process.⁴⁹
4. Divorces decreed at the separate domicile of either spouse, if the respondent litigated the jurisdictional facts.⁵⁰

Divorces which may have been valid for all purposes

5. Divorces decreed at the separate domicile of either spouse, if the respondent was personally subject to the jurisdiction of the forum, and was given procedural due process.⁵¹

Divorces which were not entitled to full faith and credit

6. Divorces decreed at the domicile of neither spouse.⁵²
7. Divorces decreed at the separate domicile of the guilty spouse (not the last matrimonial domicile), unless the respondent litigated the jurisdictional facts, or was personally subject to the jurisdiction of the forum and was given procedural due process.⁵³

Divorces which may have had local validity and have been entitled to voluntary recognition by other States

8. Divorces decreed at the separate domicile of the guilty spouse (not the last matrimonial domicile), if the respondent was given procedural due process, but was neither personally subject to the jurisdiction of the forum, nor litigated the jurisdictional facts.⁵⁴

⁴⁷The locution "procedural due process" is used in this list of divorces to indicate compliance with the laws prescribed by the forum to regulate the methods of service of process. It is assumed that all States have now prescribed methods which, considered solely as methods of giving due notice to the respondent, have been held to give sufficient notice and opportunity to be heard.

⁴⁸Atherton v. Atherton, 181 U. S. 155 (1901).

⁴⁹Cheever v. Wilson, 9 Wall. 108 (U. S. 1859); and see Haddock v. Haddock, 201 U. S. 562, 577 (1906); and Davis v. Davis, 305 U. S. 32, 41-42 (1938).

⁵⁰Davis v. Davis, 305 U. S. 32 (1938).

⁵¹Cheever v. Wilson, 9 Wall. 108 (U. S. 1859), was said by Mr. Justice White in Haddock v. Haddock [see 201 U. S. at 570] to hold that such divorces were entitled to full faith and credit, but consider the implications arising from Davis v. Davis. The suggestion is that if the Supreme Court had relied on Mrs. Davis's "general appearance" it would have been necessary for it to decide only that the case was governed by Cheever v. Wilson, but that the court did, in fact, rely heavily on more than general jurisdiction *in personam*.

⁵²Andrews v. Andrews, 188 U. S. 14 (1903).

⁵³Haddock v. Haddock, 201 U. S. 562 (1906).

⁵⁴*Ibid.*

Divorces which were probably valid for no purpose

9. Divorces decreed at the domicile of neither spouse, even if the respondent was personally subject to the jurisdiction of the forum and was given procedural due process.⁵⁵

Divorces which were valid for no purpose

10. Divorces decreed at the domicile of neither spouse, if the respondent was not personally subject to the jurisdiction of the forum.⁵⁶

11. Divorces in which the respondent was not given procedural due process.⁵⁷

After Williams

The decision in *Williams v. North Carolina*⁵⁸ which, as said at the beginning of this article, "overrules" *Haddock v. Haddock*, has stirred up the *Haddock* controversy. At the time of writing, two articles⁵⁹ and several notes and comments have appeared,⁶⁰ and there is no doubt that others will appear.

The facts were these: Mr. Williams and Mrs. Hendrix were domiciled with their respective spouses in North Carolina for about 24 and 20 years, respectively. In May, 1940, they went to Las Vegas, Nevada, resided for six weeks at the Alamo Auto Court, brought suits for divorce on the same day, got divorce decrees in August and October, respectively, married on the day when the latter decree was given, returned to North Carolina where they lived together, were indicted for bigamous cohabitation, and were convicted. They appealed to the Supreme Court of North Carolina, the judgment was affirmed, they brought *certiorari* in the Supreme Court of the United States, and that court reversed the judgment on the ground that full faith and credit to the Nevada decree was compelled.⁶¹

⁵⁵Andrews v. Andrews, 188 U. S. 14 (1903); and see Williams v. North Carolina, 63 S. Ct. 207, 213, 217 (U. S. 1942).

⁵⁶Beale, § 111.1; Goodrich, § 123, n. 7; Stumberg, p. 268: RESTATEMENT, CONFLICT OF LAWS (1934), § 111.

⁵⁷Even if divorce be analyzed as a suit solely *in rem*, notice and an opportunity to be heard are necessary in order that the proceeding be a *judicial* proceeding. See Goodrich, § 66. Moreover, compliance with the forum's laws regulating service of process is necessary in order to give the court jurisdiction to hear the suit.

⁵⁸63 S. Ct., 207 (U. S. 1942).

⁵⁹Strahorn and Reiblich, *The Haddock Case Overruled—The Future of Interstate Divorce* (1942) MD. L. REV. 29; Burns, *Two Nevada Divorces Get Full Faith and Credit* (1943) 29 A. B. A. J. 125; Hirsch, *In Memoriam: Haddock v. Haddock* (1943) 14 PA. BAR ASSN. Q. 232.

⁶⁰(1943) 43 COL. L. REV. 116; (1943) GEO. L. J. 210; (1943) 28 IOWA L. REV. 362; (1943) 27 MINN. L. REV. 403; (1943) 17 TEMP. L. Q. 197; (1943) 29 VA. L. REV. 657.

⁶¹There is no suggestion of a parallel between the conduct of these parties and those in *Holt v. Holt*, 77 F. (2d) 538 (U. S. C. A., D. C., 1935) of whom Hitz, J., said: "though we have seen much of the liberality of Nevada practice, we assume that even in that forward looking jurisdiction parties to a cause of divorce may not litigate by day and copulate by night, inter sese and pendente lite."

The Supreme Court saw two possible theories on which the case might have been tried and affirmed in North Carolina: (1) Under *Haddock v. Haddock* the Nevada decree was not entitled to full faith and credit; and (2) The parties did not acquire *bona fide* domiciles in Nevada. It refused to discuss the second theory for the reason that the verdict was general and might have been based on the first theory alone, and, moreover, the State did not seek to sustain the judgment on lack of domicile, but actually admitted that there was "enough evidence in the record to require that petitioners be considered 'to have been actually domiciled in Nevada'." Mr. Justice Douglas said that the court would reach the question of whether the North Carolina court could review Nevada's determination of actual *bona fide* domicile, "if and only if we conclude that *Haddock v. Haddock* was correctly decided. But we do not think it was."⁶²

The opinion proceeded to set out the *Haddock* case:

"This Court held that New York, the matrimonial domicile where the wife still resided, need not give full faith and credit to the Connecticut decree, since it was obtained by the husband who wrongfully left his wife in the matrimonial domicile, service on her having been obtained by publication and she not having entered an appearance in the action."⁶³

and to express its idea of the rule in that case:

"But we do not agree with the theory of the *Haddock* case that, so far as the marital status of the parties is concerned,⁶⁴ a decree of divorce granted under such circumstances need not be given full faith and credit."⁶⁵

The opinion continued with a statement that the Constitution requires "not some but full" faith and credit to judgments of State courts, and that, while a few exceptions to this requirement have been engrafted on the rule,

"So far as judgments are concerned the decisions, as distinguished from dicta show that the actual exceptions have been few and far between, apart from *Haddock v. Haddock*.⁶⁶

⁶¹*Williams v. North Carolina*, 63 S. Ct. 207, 210 (U. S. 1942).

⁶²*Ibid.*

⁶³*Ibid.*

⁶⁴At this point there is the following footnote: "Thus we have here no question as to the extraterritorial effect of a divorce decree in so far as it affects property in another state. See the cases cited, *infra*, note 5." (These cases are those which refused to compel full faith and credit to foreign judgments to control the disposition and devolution of local realty.)

⁶⁵*Williams v. North Carolina*, 63 S. Ct. at 210 (U. S. 1942).

⁶⁶*Id.* at 211.

There follows a quotation from *Alaska Packers Ass'n. v. Industrial Accident Com.*,⁶⁷ to the effect that some rational basis for the denial of full faith and credit must be found in the superior interest of the State which indulges in such a denial, and the statement that it is difficult to perceive how North Carolina's interest in Nevada's domiciliaries can be superior to Nevada's interest in them.

Mr. Justice Douglas continued with a statement that it does not help the solution of this problem to label divorce, a proceeding *in rem*, but said that such a proceeding is more than one *in personam*; and that domicile is recognized as essential to jurisdiction in divorce, at least when the defendant is not personally served and enters no appearance. He pointed out, also, that Nevada's provision that the petitioner must reside within the State for a period requires that he acquire a domicile as distinguished from mere residence,⁶⁸ a basis of jurisdiction not required in actions *in personam*. His conclusion was that decrees of divorce are more than personal judgments and involve the status of the parties.

He proceeded to an enumeration of some of the commanding problems in the field of domestic relations, protection of offspring, property interests, and the enforcement of marital responsibilities, and to a statement that it is plain that the interest of the domiciliary State can alter within its own borders, the status of the spouse who is there domiciled, provided that the method of substituted service meets the requirements of due process. Consideration of the fact that it was admitted in the *Haddock* case that the Connecticut decree bound both spouses in that State, and that the Supreme Court in *Maynard v. Hill*⁶⁹ upheld the validity within the Territory of Oregon of a legislative divorce granted there to a domiciliary against a non-domiciled wife, led the majority of the Supreme Court to conclude that the Nevada decrees were effective to change the marital status of Mr. Williams and Mrs. Hendricks and their respective spouses in Nevada.

Mr. Justice Frankfurter, concurring specially, addressed himself to the impropriety of the Supreme Court's turning itself into a divorce court for the United States by determination of who is the deserted spouse, or by decisions based on the notions of policy concealed by the concept of matrimonial domicile, and to an opinion that full faith and credit must be given whenever the divorce decrees of the domicile meet the requirements of due process, in the absence of which they would be entitled to no legal sanction, even in that State.⁷⁰

Mr. Justice Murphy, dissenting, referred to the cases in which it had been decided that full faith and credit was not compelled unless one of

⁶⁷294 U. S. 532, 547 (1935).

⁶⁸Citing NEV. COMP. LAWS 1929, § 9460, as amended NEV. LAWS 1931, p. 161, and *Latterner v. Latterner*, 51 Nev. 285, 274 Pac. 194 (1929), and *Lamb v. Lamb*, 57 Nev. 421, 65 P. (2d) 872 (1937).

⁶⁹125 U. S. 190 (1887).

⁷⁰*Williams v. North Carolina*, 63 S. Ct. at 216-217 (U. S. 1942).

the spouses had acquired an actual good faith domicile at the forum and expressed the opinion that, thus analyzed, the question in the case at bar was simple, and the only proper answer—that the petitioners did not acquire such a domicile in Nevada. He envisaged the possibility that the decrees might be valid in Nevada, but said that the problem involves the interaction of public policy upon the constitution, and that a perfunctory application of the literal meaning of the full faith and credit clause introduces an undesirable rigidity in a situation in which each State should be free to regulate the rights of its own citizens within its own area.⁷¹

Mr. Justice Jackson, dissenting, refused to join in a decision which he characterized as one which compels North Carolina to subordinate its law to the Nevada decrees.

“It is not an exaggeration to say that this decision repeals the divorce laws of all the states and substitutes the law of Nevada as to all marriages, one of the parties to which can afford a short trip there.”⁷²

It is a little difficult to determine whether he sees more vividly the procedural hardships which may arise from factual ignorance of the suit, or the substantive hardships which may arise if one spouse may desert the other and get a divorce for causes which would not be causes in the State whence he or she deserted. The fact that he refers to the powerlessness of the State to protect “either its own policy or the family rights of its people”⁷³ may show that he sees both with equal vividness.

He sees an attempt by North Carolina to protect its strict policy as to divorce by convicting the parties of bigamy, the right of North Carolina to have so strict a policy, the brief interlude in Nevada, and the thin grounds upon which Nevada grants divorces. He does not see any difficulties so long as each State is confined to divorcing its own permanent inhabitants, but sees complications when a State attempts to visit disadvantages on persons who have never lived there. On the theoretical side he is disturbed by a decision which allows one spouse to carry the *res* into a State and there destroy the *res* which remained with the other spouse in the State in which they long lived together, and finds it difficult to appreciate why the relationship of marriage should be subject to dissolution in the forum, under a procedure which would not support a judgment on a grocer's bill. He is willing to concede that the decrees are probably good in Nevada to protect the petitioners from bigamy proceedings there, but puts it on the basis that Nevada need not adhere to monogamy and can legalize polygamy in the name of divorce as well as in any other way, and that Nevada, through its control of local property can deal with it in the same way.

⁷¹*Id.* at 217-219.

⁷²*Id.* at 219.

⁷³*Ibid.*

Mr. Justice Jackson's opinion is that the majority paid lip service to the requirement of domicile, but that the case should be treated as if the parties did exactly what they did do, that the Nevada court made no finding as to domicile, but as to residence,⁷⁴ and concludes that the decision of the Supreme Court constitutes an acceptance of the actual facts as enough to establish domicile.⁷⁵

He is of the further opinion that, assuming that the facts constituted domicile for Nevada, that State cannot force its concept of domicile on other States, and seems to be of the opinion that, in this connection, the determination of domicile is a federal question.⁷⁶

The opinions of the writers on the *Williams* case are just as startlingly unanimous with respect both to analysis of its effect and evaluation thereof, as were the opinions of those who analyzed and evaluated the *Haddock* case.

Burns sees in the facts such obvious evidence of collusion as to lead him to suspect that the Supreme Court was waiting for a chance to approve the "current notorious practice of getting 'quickie' divorces,"⁷⁷ and suggests that a remand for further development of the question of domicile, and particularly of good faith,⁷⁸ would have avoided the overruling of a leading case, would have saved the court from the suspicion of endorsing a collusive divorce, and would have arrayed the great moral prestige of the Supreme Court against a growing practice which amounts to down-

⁷⁴While the finding of the Nevada court is in terms of residence [see *Williams v. North Carolina*, 63 S. Ct. at 209 (U. S. 1942)] the majority of the Supreme Court were of the opinion that this was a finding of domicile [see *id.* at 213].

⁷⁵*Williams v. North Carolina*, 63 S. Ct. at 224 (U. S. 1942).

⁷⁶It seems that this is a necessary conclusion from Mr. Justice Jackson's opinion: if Nevada cannot force its concept of domicile on North Carolina, neither can North Carolina force its concept on Nevada. Moreover, this is not a situation in which the relationship of only one spouse to the forum is concerned: even for purposes of the existence of the rights of the North Carolina spouse in Nevada, he or she is entitled to substantive due process and his or her rights cannot be destroyed without jurisdiction.

⁷⁷Burns, *Two Nevada Divorces Get Full Faith and Credit* (1943) 29 A. B. A. J. 125. Burns points out that this was the impression of some newspaper editors. Citing *Editorial Comment of the Lay Press*, (1943) A. B. A. J. 78.

⁷⁸Neither in the opinion in the *Williams* case, nor in Burns's article, is it pointed out what is meant by "bona fide" or "good faith" domicile. If what is meant is that there must be a genuine intention directed to remaining in the State (*animus manendi*), then no meaning is added to the simple word "domicile" by the addition of the Latin words or their English equivalent. If what is meant is that the motive must not be to get a divorce, then, either those who use the words are wrong, or the law has changed. The most ignoble motive does not destroy the effect of the *animus manendi*. *Williamson v. Osenton*, 232 U. S. 619 (1913) (for the purpose of conferring jurisdiction on a federal court by establishing diversity of citizenship); *Ex parte Peterson*, 166 Fed. 536 (D. C. Minn., 1908) (to become an inmate of a bawdy house); *Gasper v. Wales*, 223 App. Div. 89, 227 N. Y. S. 421 (1928) (to live with an adulterous paramour). The motive may, however, influence the readiness with which the court is convinced by the evidence of intention to remain [See *Ex parte Petterson*, *supra*], and of all motives, the motive of getting an easy divorce may well create the greatest suspicion of the genuineness of the *animus manendi*.

right perjury.⁷⁹ He castigates the court for being unimpressed by the fact that the great authority, Beale, came to be persuaded that the *Haddock* case was sound; and for failing to recognize the inclusion of the *Haddock* case in the "law of the land," through its incorporation in the Restatement. He adverts to the possibility that this decision may require the court to adopt Bingham's analysis, which will permit one State to alter some of the legal relationships arising from the status of marriage upon jurisdiction of one spouse only, but will permit that State to alter other relationships only if it has personal jurisdiction of both spouses. He writes:

"The Bar can justifiably resent the upsetting of old precedents unnecessarily when the existing law seems to be adequate, certainly as adequate as the new decision which placed the whole subject of interstate domestic relations in a turmoil."⁸⁰

Hirsch is of the opinion⁸¹ that, while the decision in the *Williams* case does not necessarily overrule the dictum in the *Haddock* case, the Supreme Court must have intended to approve the notion that a divorce decree divorces for all purposes, or for none. In so far as *status* is concerned, the anomaly of persons married in some States and unmarried in others will continue, unless the decree is entitled to full faith and credit, or is inoperative for failure to comply with the due process clause.⁸² Moreover, she thinks that the Supreme Court in reaching for uniformity in the field cannot have intended to approve of an attitude which would make a given man and woman divorced as to *status*, but married as to property.⁸³

⁷⁹Is this a problem to be solved by the Supreme Court in connection with a collateral attack on a decree of divorce? In domicile cases, actions speak louder than words. Until the Supreme Court decides that there can be no re-examination of the fact of domicile in collateral attack on a divorce decree the solution is obvious. The court in which the validity of the decree is attacked is not compelled to be credulous of testimony of the petitioner that he or she intended to remain in Nevada for "an indefinite time", nor, if the State court is credulous, is the Supreme Court compelled to follow.

⁸⁰It is difficult to perceive how the decision in the *Williams* case creates the turmoil which Burns sees. On the contrary, it seems to reduce the turmoil which the *Haddock* case created.

⁸¹*In Memorial: Haddock v. Haddock*, (1943) 14 PA. BAR ASSN. Q. 232. A part of this article is given to a consideration of the effect of the *Williams* case on decrees for alimony granted under the *Haddock* dispensation, at a time when it was believed that full faith and credit need not be given even though the divorcing spouse acquired a domicile in the divorcing State, unless the latter acquired personal jurisdiction of the respondent or was the last matrimonial domicile. The conclusion is that, if supervening changes in circumstances are grounds for modification of a decree for alimony, the decision in the *Williams* case is such a change of circumstances and that the doctrine of the "law of the case" does not stand in the way of giving relief to the "divorced" alimony-paying husband.

⁸²Mr. Justice Frankfurter's specially concurring opinion seems to support this conclusion, as do the two dissenting opinions.

⁸³The remark of Mr. Justice Douglas [see footnote 4, 63 S. Ct. at 210] to the effect that the case concerned only status and not the effect of the decree as it affects property in another State, may vitiate this conclusion, which is discussed, *infra*, p.

Strahorn and Reiblich express the opinion⁸⁴ that the effect of the *Williams* case is to make all separate-domicile divorces valid, in the sense that they are entitled to full faith and credit, but that it is still open to other States to question the actuality of the domicile claimed at the forum. They see a beneficial simplification in the future lack of necessity or opportunity for inquiry into the fault of the divorcing spouse, the search for the last matrimonial domicile, determination of the fact and nature of an entered appearance, decision whether to grant comity or refuse it, and, to a large extent, inquiry into the perplexing problem of the nature of a divorce decree—in *rem* or *in personam*. They suggest that the decision creates a need for inquiry into other matters: (1) Will judicial scrutiny be directed to the procedural insufficiency of notice by publication? (2) Will domicile of one party continue to be the minimal requirement of contact to satisfy the due process clause? (3) Is there left open the possibility that less contact than domicile will allow of some local validity and of some recognition as a matter of comity? (4) Is it possible that, for purposes of full faith and credit, a person may be divorced for some purposes and not for others? (5) What is the effect on the doctrines of *res judicata* and estoppel in divorce cases? (6) To what extent, if any, can Congress dictate the policy of recognition of extra-state divorce?

The writers of the comments in the *Columbia*⁸⁵ and *Georgetown*⁸⁶ legal periodicals welcome the *Williams* case as a clarification of the minimal requirement for jurisdiction of the status and a harbinger of divisible divorce.⁸⁷ The writer of the comment in the *Columbia Law Review* further emphasizes the problem inherent in the possibility of re-examination of the jurisdictional fact of domicile. The writers in the *Iowa*,⁸⁸ *Minnesota*,⁸⁹ *Temple*,⁹⁰ and *Virginia*⁹¹ legal periodicals see in the case, rather, an unfortunately chosen clarifier of the problem of divorce jurisdiction and a welcome bringer of uniformity in recognition. The writer in the *Iowa Law Review* expresses the opinion, further, that there should have been a stiffening of the jurisdictional requirement of due process, rather than a relaxation of the requirements for full faith and credit.⁹²

⁸⁴*The HADDOCK Case Overruled—The Future of Interstate Divorce* (1942) 7 MD. L. REV. 29.

⁸⁵(1943) COLUM. L. REV. 116.

⁸⁶(1943) GEO. L. J. 185.

⁸⁷It is not clear whether the writer in the *Georgetown Law Journal* intends to support true divisibility of divorce, or whether he appreciates the possibly more rational application of the notion that alimony need not be predicated upon the existence of the marital relationship, but may be based upon its having existed. See text, *infra*, p.

⁸⁸(1943) 28 IOWA L. REV. 362.

⁸⁹(1943) 27 MINN. L. REV. 403.

⁹⁰(1943) 17 TEMP. U. L. Q. 197.

⁹¹(1943) 29 VA. L. REV. 657.

⁹²(1943) 28 IOWA L. REV. 362, 366.

Agreement with the conclusion that the *Williams* case makes valid all divorces granted to husbands at their separate domiciles, in so far as capacity to remarry is concerned, and that, to that extent, *Haddock v. Haddock* is overruled, is compelled. The majority of the Supreme Court assumed that Mr. Williams got a domicile in Nevada, and a husband can get a separate domicile, even though he desert his wife in order to do so. That is to say, the only inquiry in the case of a man who asserts a change of domicile is: Did he have the necessary intention to remain in the new domicile and, when absent, to return there—the *animus manendi et revertendi*?

Agreement with the conclusion that the same holds true of wives is not compelled, though it is probably correct. It is not yet certain that a wife who deserts her husband can acquire an independent domicile. It has been held that, by agreement with the husband, a wife need not acquire his domicile upon marriage,⁹³ and that the wife can acquire a separate domicile, though she leave him for no fault of his, at least if he agrees to the maintenance of a separate home.⁹⁴ Under the law of this country, though not under English law,⁹⁵ a wronged wife can get a separate domicile for purposes of divorce,⁹⁶ and probably for all purposes.⁹⁷ It was not clearly decided in the *Williams* case that Mrs. Hendrix had acquired a separate domicile in Nevada: it was assumed that she had and, evidently, the State of North Carolina did not argue that her fault precluded such an acquisition. It is not, however, to be supposed that there was an intention to retrogress from the great step forward taken in *Haddock v. Haddock* in the direction of putting men and women on the same basis for this purpose. The conclusion that fault is no longer a factor in the power to acquire a separate domicile is, therefore, justified if not compelled.

It is submitted that fault, as an element in the power to acquire a separate domicile, or as jurisdictional fact for divorce, is no longer material. Presence plus the requisite *animus* to acquire a domicile is all that is necessary. This is desirable for several reasons: First—There is a great reduction of cases in which it would be possible for various courts to have different ideas about, or to make mistakes about the content of the concept "fault" under the law of the last matrimonial domicile. Only the law of that State should be consulted on this issue, as a domiciliary of a State to whose laws his marriage is, by definition, subjected, cannot "desert" his spouse, unless by those laws his acts constitute "desertion."

⁹³*Commonwealth v. Rutherford*, 160 Va. 524, 169 S. E. 909 (1933).

⁹⁴*Younger v. Giannotti*, 176 Tenn. 139, 138 S. W. (2d) 448 (1940).

⁹⁵Under English law, the older view, that a wife cannot acquire a domicile separate from her husband, prevails [*Lord Advocate v. Jaffrey*, [1921] 1 A. C. 146], even though a judicial separation has been decreed [*Attorney General v. Cook* [1926] A. C. 444], except, perhaps, in the anomalous situation created by a case within the rule of *Ogden v. Ogden*, [1908] p. 46, *De Montaigne v. De Montaigne* [1913], p. 154.

⁹⁶*Ditson v. Ditson*, 4 R. I. 87.

⁹⁷*Williamson v. Ostenton*, 232 U. S. 619, 58 L. ed. 758, 34 S. Ct. 442 (1914); RESTATEMENT, CONFLICT OF LAWS (1934), § 28.

Secondly—It is undesirable that possible subsequent marriages of the divorcing spouse should depend for their validity on a search for the identity of the last matrimonial domicile and the content of its laws of desertion. It is doubtful that laymen go behind a divorce decree to ascertain its validity and the greatest possible number of persons who live together like man and wife should be deemed validly married. Whether it be desirable to punish men and women who in fact desert their spouses, divorce in another State, and remarry, may be debatable; but no valid reason for imposing either a direct or an indirect punishment on the innocent second "spouse" is perceived, still less the desirability of imposing upon possible children of the second "marriage," the stigma of bastardy.⁹⁸ Thirdly—Each State has a very real interest in the marital status of its domiciliaries. Marriage is important for the present stability of the State and important as the source whence usually come the future citizens of the State. It is at least the general belief that married persons make more desirable citizens than unmarried persons. Moreover, if a man and woman live together like husband and wife, children are to be expected and the duty of the "father" to support his children is both easier to enforce and more advantageous to the children, than the duty of the begetter of the bastard. Fourthly—People do honestly move to other States; and, honestly believing that they were wronged, do divorce in those States; and, honestly believing that the divorce is valid, remarry. The desirability of a doctrine of jurisdiction to divorce which makes such a marriage bigamous, is questionable. It is submitted that a rule of law which makes unlawful the things done by any considerable number of people is under suspicion of being based upon the notions of a small number of persons who impose their wills on the larger number. Should not law implement the things that people actually do, rather than the things that other people think that they ought to do?

May it not be that the only real test of the desirability of a rule of law is: Does it work. If the general belief is that a person should not be able to desert his or her spouse, divorce in another State, and remarry; and if the invalidity of the second marriage keeps spouses from doing those acts, the law should be that the second marriage is invalid. If, however, a rule of law designed to prevent the doing of those acts does not operate as a preventative, it is at least arguable that the rule of law should not exist. It is submitted that such a rule of law should not exist for one of two reasons: either the acts which the rule of law are intended to prevent are not generally believed to be socially evil; or some other sanction is necessary as the prescribed sanction is not working. If the sanction is not working, but exists as a part of the law, is there not a grave danger that the whole law will be even more thrown into disrepute? May it not be that that danger, alone, is sufficient to call for the abolition of a rule of law?

⁹⁸See the dissenting opinion of Mr. Justice Holmes in *Haddock v. Haddock*, 201 U. S. 562, 628 (1906), and *Williams v. North Carolina*, 63 S. Ct. 207, 215-216 (U. S. 1942).

It seems clear that the sanction, nullity of the second marriage, does not work. There have been very few cases of prosecutions for bigamy, bigamous cohabitation, or adultery, following extra-state divorces. It seems that these remarriages are in fact accepted by society as marriages. It is often said that there are three parties to all marriages and divorces, the man and woman, and the State. If we find, as we do, that the States are not prosecuting the bigamous spouse; and if we find, as we do, that the States are allowing the spouse, who is divorced by a "void" divorce decree, so to act as to make the void divorce valid for practical purposes;⁹⁹ are we not driven to the conclusion that the State, as the third party, does not disapprove very violently of these "void" divorces?

This argument leads directly to the conclusion that the migratory "Reno" divorce, without pretense of domicile other than the required six weeks of residence, is as valid as the divorce with actual domicile. Why not?¹⁰⁰ Parties to these divorces who remarry are not prosecuted, and by acting as if the divorce were valid, e.g. by remarrying, the stay-at-home spouse estops him or herself from attacking the validity of the divorce. These divorces are accepted, socially, as valid; why should they not be accepted, legally, as valid? What is gained by holding them to be void? It must not be forgotten that, under the *Williams* case, all that is necessary to validate them is that the deserting spouse actually gain a domicile in the divorcing State.

It may be said that this argument overlooks the interest of the stay-at-home spouse in the marriage and the interest of the domicile of that spouse. Both that spouse and the State of his or her domicile are entitled to protection, and if nullity of the extra-state divorce is the only available protection, the divorce should be void. That protection, however, is just as necessary if the deserting spouse gains an actual domicile in the divorcing state; and the *Williams* case denies the protection of nullity in that event.

What protection does the State of the last matrimonial domicile need: protection from the immoral spectacle of the prompt return of the divorcing spouse, newly remarried? Evidently not. A prosecution like that in the *Williams* case is a rarity, a sporadic phenomenon; and so rare that such a prosecution leads to the sometimes expressed suspicion that the

⁹⁹See Harper, *The Myth of the Void Divorce* (1935) 2 LAW AND CONTEMP. PROB. 335.

¹⁰⁰The opinion of Mr. Justice Douglas in the *Williams* case offers support for the conclusion that the Supreme Court is not ready to decide that a divorce decree based on less than domicile is rendered with due process of law. He speaks of a suit for divorce as being "not a mere in personam action" [63 S. Ct. at 213]. In the next sentence he speaks of domicile as essential to give jurisdiction entitling the decree to full faith and credit, but his immediately subsequent remarks concern the "rightful and legitimate concern in the marital status of persons domiciled within its borders" of "each State as a sovereign", [Ibid]. It is submitted, however, that *Bell v. Bell*, 181 U. S. 175 (1901), to which he refers as indicating that there would be a different problem if North Carolina had re-examined the fact of domicile in Nevada, can also be overruled should it appear desirable to do so.

prosecuting authorities were set in motion as a consequence of the desire of some person to injure the persons accused, rather than by a tenderness for the morals of the public.

Both the State of domicile of the deserted spouse and the spouse may need protection in the economic field and both seem entitled to it. If the husband does not support the spouse, the State must. If the duty to support the deserted spouse arises solely from the continued existence of the status of marriage, the extra-state divorce should be ineffective to dissolve that status. This economic protection is just as necessary if the deserting spouse acquires an actual domicile in the divorcing State; and the *Williams* case denies the continued existence of the status, at least as to the divorcing spouse, in that event.

The "divisible" divorce may solve the problem. Some of the commentators on the *Haddock* and *Williams* cases have expressed the idea that a divorce, which is decreed without personal jurisdiction of the respondent in any State but that of the last matrimonial domicile, is not entitled to full faith and credit for any purpose but the restoration to the petitioner of the capacity to remarry.¹⁰¹ It is possible, but improbable, that the Nevada decree in the *Williams* case did not dissolve the marital status of the spouses who stayed in North Carolina.¹⁰² It should be noted that, even if the decree did so dissolve their status, North Carolina may still make them incapable of remarrying, though it is doubtful that she would desire to do so. Incapacity to remarry may persist for local purposes after a complete divorce,¹⁰³ and even for interstate purposes.¹⁰⁴ It is not to be supposed, however, that any State will impose such an incapacity. The deserted spouse, guilty of no marital wrong, is, by definition, as desirable a citizen as a married person.

It may not be improbable that the Supreme Court will recognize the divisibility of marriage and divorce and allow the State of the last matrimonial domicile to impose a duty to pay alimony to the divorced spouse

¹⁰¹Some evidence that the Supreme Court will accept the notion of a divisible divorce may be found in footnote 4 to the majority opinion in the *Williams* case. It reads: "Thus we have here no question as to the extraterritorial effect of a divorce decree in so far as it affects property in another state . . ." See 63 S. Ct. at 210.

¹⁰²The majority opinion speaks [63 S. Ct. at 215] of the power of North Carolina "to enforce her own policy regarding the marriage relation" but confines it "within the limits of her political power." Earlier in the opinion, however, it was said [63 S. Ct. at 213] that the Nevada decrees "were wholly effective to change in that state the marital status of the petitioners and each of the other spouses." It seems that if the decree was effective to change the status of the petitioners in Nevada and was, for that reason, entitled to full faith and credit to that extent in North Carolina, it is also entitled to full faith and credit as to its effect on the status of the stay-at-home spouses.

¹⁰³Prohibitions of remarriage by the guilty party after divorce for life, or for a period not coterminous with the period for appeal, have no extraterritorial effect. See Taintor, *Effect of Extra-State Marriage Ceremonies* (1938) 10 Miss. L. J. 105-111, 113, *et seq.*

¹⁰⁴Prohibition of remarriage to the paramour, for adultery with whom the divorce was decreed, has extra-territorial effect. See *id.* at 112.

upon the ground that the marriage was not dissolved as to its economic incidents. If the court is of the opinion that the duty of support stems from the relationship of husband and wife and if the extra-state decree is entitled to full faith and credit for all purposes, Nevada will be allowed to do that which so troubled the two judges who dissented in the *Williams* case, namely to extend her policy into North Carolina.¹⁰⁵ Even though Nevada has power to affect the status of her own domiciliaries as to capacity to remarry, and even though her dissolution of the status may dissolve the marriage in such manner that the North Carolina spouses are no longer married persons, she should not be able to discharge the duty of her domiciliaries to support the spouses they left behind.

If North Carolina wishes to impose such a duty on the deserting spouse she should have power to do so. It is true that her power to impose this duty will depend upon her ability to acquire personal jurisdiction of the deserting spouse, or upon the presence in North Carolina of property of that spouse upon which jurisdiction *quasi in rem* can be asserted. North Carolina would lose some of her effective power if the divorcing spouse stayed without the State, as personal service would be impossible and substituted service would be ineffective as to personal liability. The validity or nullity of the divorce would be immaterial as the person under the duty to support is assumed to have acquired a domicile in some other State.¹⁰⁶ It should be noted, also, that North Carolina would lose none of her power to compel the payment of alimony if divorces based on residence alone are to be held as valid as those based on domicile. In that case the person under the duty to support would remain domiciled in North Carolina and personal jurisdiction could be asserted on substituted service of process.¹⁰⁷

Certain disadvantages, both theoretical and practical, will be perceived in this idea of divisible divorce. First: Where is the division? Will North Carolina be compelled to give full faith and credit only with respect to the lawfulness of the cohabitation of the spouses who make up the second marriage? It seems improbable. If she attempts to draw the line at that point, must she not be compelled to recognition of the divorce to such an extent that the children of the second marriage will be legitimate? Otherwise, she will violate the policy which the Supreme Court evidently intended to implement by the decision in the *Williams* case, when it said:

"But society also has an interest in the avoidance of polygamous marriages and in the protection of innocent offspring of marriages deemed legitimate in other jurisdictions."¹⁰⁸

¹⁰⁵See *Williams v. North Carolina*, 63 S. Ct. 207, 218, 219 (U. S. 1942).

¹⁰⁶The duty to pay alimony is a personal duty and no personal judgment can be rendered therefor, except upon service of process within the State, or upon substituted service of process if the defendant should establish a domicile in the State. *Milliken v. Meyer*, 311 U. S. 457 (1940).

¹⁰⁷*Ibid.*

¹⁰⁸See *Williams v. North Carolina*, 63 S. Ct. 217, 215 (U. S. 1942).

Will she be permitted, while recognizing the legitimacy of those children, to deny them the normal rights of inheritance from their parents? It is possible. A note to the opinion of Mr. Justice Douglas cites three cases which have refused "to require courts of one State to allow acts of judgments of another to control the disposition or devolution of realty in the former," and ascribes the results to the doctrine that each State is the "sole mistress" of its laws concerning real property.¹⁰⁹

Will she be permitted to refuse to recognize the validity of the Nevada divorce in so far as property rights between the divorced and divorcing spouses are concerned? May she extend this refusal to deny marital property rights to the second spouse? Affirmative answers to these questions seem more probable. The first wife should, perhaps, not be denied her marital rights because of the desertion of her husband, and the second wife is not so deserving of protection as the innocent children. She chose to marry a divorced man and may be treated as if she knew that she was taking the chance that his divorce was not valid for all purposes.¹¹⁰

A theoretical difficulty appears. Common law dower and courtesy rules, and their statutory substitutes and successors, are in terms of *husband* and *wife*. Is it to be supposed that the courts of North Carolina will change the definitions of those words to exclude the second wife, who is a "wife" as to status? The definition can, of course, be changed by statute.

Secondly: Will the courts of the States find it easy to accept this notion of divisible divorce? It seems more likely that they will continue

¹⁰⁹See *id.*, note 5, p. 211. The cases cited are *Fall v. Eastin*, 215 U. S. (1909); *Olmsted v. Olmsted*, 216 U. S. 386 (1910); *Hood v. McGehee*, 237 U. S. 611 (1914). The latter two of these cases uphold the constitutionality of a denial of inheritance to children legitimated under the laws of another state [*Olmsted v. Olmsted*, *supra*] and to children adopted in another state, [*Hood v. McGehee*, *supra*], although locally legitimated and adopted children could inherit. I have elsewhere expressed the opinion that, as assertions of local policy, the New York and Alabama cases which were affirmed by the Supreme Court are bottomed upon a mistaken notion of that policy [See Taintor, *Legitimation, Legitimacy and Recognition in the Conflict of Laws* (1940) 18 CAN. BAR REV. 589, 711], and question the propriety of the affirmances. Compulsory recognition of the creation of the naked status without compulsory recognition of the status as the generator of beneficial rights seems to give an unreal reality to the concept of status. It is to be hoped that *Olmsted v. Olmsted* and *Hood v. McGehee*, both *supra*, will be overruled when the question next reaches the Supreme Court. I do not contend that there cannot be local policy so strong that it will justify the denial of certain rights which normally flow from status, but do maintain that only a strong policy can justify classification of such rights as deniable locally. For instance, the Southern States could properly classify the cohabitation of black and white spouses as deniable locally. The interest of the State in freedom from strife and riot needs that protection, and no black and white persons may cohabit within the State. Cf. *State v. Brown*, 47 Ohio St. 102, 23 N. E. 747 (1890), in which first cousins were convicted of fornication and adultery under OHIO REV. STATS., § 7019, "whether married to each other or not."

¹¹⁰Mr. Justice Jackson suggests the converse in his dissenting opinion in the *Williams* case [see 63 S. Ct. at 223]. He remarks that nothing in the Constitution prevents Nevada from establishing bigamy or the legitimacy of children of bigamous marriages, adverts to Nevada's control over property in the State, and supposes that Nevada can deal with the problem in the name of divorce.

to define "wife" and "husband" for all purposes in terms of "persons in the status of marriage;" to determine that Mr. Williams and the first Mrs. Williams are not married, because they were divorced, and that Mr. Williams and the Second Mrs. Williams are married and the only Williams husband and wife.¹¹¹

It seems then that, if the protection needed by the deserted spouse and by the State in which she is domiciled at the time of the desertion, the last matrimonial domicile, can be given without indulging in the concept of divisible divorce no harm will be done and good may accrue. If divorces granted upon separate domicile, or upon residence, are valid for all purposes the States will be compelled to make an independent examination of the means to be chosen to protect themselves, their domiciled deserted spouses, the spouses of the second marriage, and the children who may be born of either marriage. This can be done if the duty to pay alimony owed by a man to a woman can be predicated on some relationship other than marriage; if property rights between a man and woman can be also so predicated; and if property rights between a parent and child can be predicated upon some relationship other than legitimacy. All these are possible.

The right to alimony is independent of the continuance of the marital status, and of the simultaneous termination thereof and the beginning of the decreed duty to pay. Alimony can be decreed in a separate suit, after an absolute decree for divorce *a vinculo matrimonii*.¹¹² Such a decree may be given whether the divorce was decreed in the same State,¹¹³ or in another State,¹¹⁴ whether the divorce was granted to the husband¹¹⁵ or to the wife,¹¹⁶ and may even be granted where there was no marriage.¹¹⁷

¹¹¹The final disposition of the *Davis* case in the District of Columbia supports this conclusion. In affirming the Court of Appeal for the District, the Supreme Court remanded the case to the District Court for a decision giving full faith and credit to the extra-territorial divorce, but said that no question was presented as to the power of the District of Columbia Court over alimony. The District Court did not vacate its decree for alimony and the husband again appealed. The Court of Appeal reversed, and ordered the District Court to vacate its order and to relieve the appellant from making further payments of alimony. *Davis v. Davis*, 114 F. (2d) 492 (1940).

The Court of Appeal quite evidently made its decision because the petitioner for alimony was no longer the "wife" of her divorcing husband. The cases cited were *Thompson v. Thompson*, 226 U. S. 551 (1917), and *Bloedorn v. Bloedorn*, 76 F. (2d) 812 (U. S. C. A., D. C. 1935), cert. denied 295 U. S. 746 (1935). In the latter [see 76 F. (2d) at 814] the court spoke of the extra-state decree as follows: "In legal effect it operates to vacate the provision made for the wife by recognizing that she is no longer wife, because of the Virginia decree . . ."

¹¹²See, e. g., MASS. GEN. LAWS (Ter. ed., 1932) c. 208 § 34, and other statutes cited in Vernier, 2 AMERICAN FAMILY LAWS, pp. 268-273, Table LIII.

¹¹³See Comment (1927) 4 WIS. L. REV. 226; Notes 42 A. L. R. 1386-1389.

¹¹⁴See Notes 42 A. L. R. 1389-1398.

¹¹⁵See *id.*, 1392-1398.

¹¹⁶See *id.*, 1389-1392.

¹¹⁷See ILL. REV. STAT. (1941) c. 40, § 19. (20) which permits the allowance of alimony to a bigamous wife, but not inconsistent with the rights of the prior wife or wives.

It appears, then, that alimony can be decreed because the parties *were* husband and wife. There seems to be no reason which will prevent an analogous statutory treatment of rights in property after the death of the ex-spouse. The solution of the problem in such manner as to do no injustice to either the ex-wife or the wife, or to the children, will be difficult; but the same difficult problem will exist if the divorce is deemed divisible.

Rights of inheritance of children do not necessarily depend upon their legitimacy, upon their legitimation, or upon their adoption. In nearly all of the States, bastards inherit from the mother,¹¹⁸ and in Iowa¹¹⁹ and Wisconsin¹²⁰ they inherit from the father. Rights of support of children do not depend on legitimacy, legitimation or adoption, but exist independently of any legitimate status.¹²¹ I do not suggest that the problem should be solved on the theory that children of the second marriage are bastards, but that it can be so solved.

It appears that the "multiple incidents of the legal marriage relation," the mutual independence of which is emphasized by Bingham,¹²² can be sanctioned if the concept of "divisible" marriage be adopted. Any one or any combination thereof can be terminated by a limited compulsory, or a voluntary, recognition of an extra-state divorce. Any one or any combination thereof can be kept intact by permitted refusal of, or denial of the power of, voluntary recognition of such a divorce.

On the other hand, any one or any combination, excepting the denial of capacity to the divorcing spouse to remarry can be sanctioned even if the extra-state divorce must be recognized as terminating the marriage for all purposes.

One disadvantage to the suggestion of divisible divorce has already been stated. Courts are not likely to take kindly to the notion.¹²³ Furthermore, it is difficult to see any advantage in this idea. The long habit of persons skilled in the law is to think of marriage as an integral concept, to ask themselves, "Are this man and this woman married?" If the answer is affirmative, the habit is to conclude that they have certain legal relations *inter se* and in relation to others, if in the negative, they do not have these legal relations.

¹¹⁸Vernier, in 4 AMERICAN FAMILY LAWS, § 249, lists among this group all the States, except Louisiana, where the bastard is allowed only "alimony."

¹¹⁹IA. CODE (1927) §§ 12030-31 (provided the paternity of the father is proved during his life).

¹²⁰WIS. STATS. (1931) §§ 237.05, .06 (provided that the father is so adjudged under §§ 116.01, .16, or that he admits paternity in open court. All children are the legitimate children of both parents in Arizona [ARIZ. REV. CODE (1928) § 273] and North Dakota [N. D. COMP. LAWS SUPP. (1913-25) § 10500b1]. It is somewhat doubtful whether the statutes of Kansas (KANS. STATS. (1935) §§ 22-122, -123, -124) create the status of legitimation, or operate only to give rights of inheritance to a recognized natural child. See Pfeifer v. Wright, 41 F. (2d) 464 (C. C. A. 10th 1930).

¹²¹Some form of bastardy proceedings exists in all States.

¹²²See Bingham, *THE AMERICAN LAW INSTITUTE vs. THE SUPREME COURT, In the Matter of Haddock v. Haddock* (1936) 21 CORN. L. Q. 393, 416-417.

¹²³See the discussion of the final disposition of the *Davis* case in note 111 *supra*.

Some reification of marriage seems inevitable and not dangerous, if we realize that the *res* is metaphoric, a short-hand description of the results of a man's and woman's consenting together to take on the responsibilities and the rights and privileges of man and wife. Courts,¹²⁴ and jurists¹²⁵ find it convenient to think of marriage as the static source of legal relations.

What value is there in an attempt to change this habit of thought if no practical advantage will be gained by the change. Moreover, the few laymen to whom I have attempted to explain the notion of divisible divorce find in it a comical example of the attenuated thinking of which our profession is accused. Given the choice between two concepts to reach a result or to explain a result should we not, perhaps, select that which seems rational to intelligent laymen? Finally: The whole problem of economic protection to be given to the State of the last matrimonial domicile, to possible future domiciles of the divorced spouse, to children of both marriages and to the second spouse and to his or her domicile must be worked out. A more rational approach to the problem is likely if consideration thereof is not complicated by an unnecessary concept of partial marriage.

Conclusions

The following divorces are decreed with due process of law and are entitled to full faith and credit for all purposes:¹²⁶

1. Divorces decreed at the matrimonial domicile or at the domicile of both spouses if the respondent is given procedural due process.¹²⁷
2. Divorces decreed at the last matrimonial domicile which is, also, the domicile of one of the spouses, if the respondent is given procedural due process.

¹²⁴"A metaphysical idea, which is what the status of marriage is, is not strictly a *res*, but it, to borrow a phrase, savors of a *res*, and has all along been treated as such." See *Salvesen v. Admr. of Austrian Property* [1927] A. C. 641, 662.

"[A divorce] suit, however, is not a mere *in personam* action. Domicile of the plaintiff . . . is recognized . . . as essential to give the court jurisdiction . . ." See *Williams v. North Carolina*, 63 S. Ct. 207, 213 (U. S. 1942).

¹²⁵"The law of every common law state . . . deals with marriage as a voluntary union of a man and a woman. This involves two steps: first, a valid agreement of the man and woman . . . which creates a relation between them; and second, the legalizing of this relation by act of law, thus changing it into a status." See Beale, *op. cit.* § 121.2.

"It is clear that marriage is much more than a contract. . . . Once the contract is executed, marriage becomes a domestic relation." See Goodrich, *op. cit.*, § 112.

See also: Cheshire, *PRIVATE INTERNATIONAL LAW* (2d, 3d., 1938) 219, 232; Savigny, *PRIVATE INTERNATIONAL LAW* (Guthrie's Trans.) § 379; Planiol, *TRAITE ELEMENTAIRE DE DROIT CIVIL* (8th ed., 1920), No. 1022; Colin et Capitant, *COURS ELEMENTAIRE DE DROIT CIVIL* (3d ed., 1927) 274.

¹²⁶"For all purposes" indicates that the decree terminates the status and all legal relations deemed to flow therefrom.

¹²⁷"procedural due process" refers to compliance with the requirements of the forum with respect to service of process, whether personal or substituted service.

3. Divorces decreed at the separate domicile of either spouse, if the respondent litigates the merits of the divorce.

4. Divorces decreed at the separate domicile of either spouse, if the respondent is subject to the personal jurisdiction of the forum and is given procedural due process.¹²⁸

The following divorces are decreed with due process of law, are entitled to full faith and credit for some purposes, and should be entitled to full faith and credit for all purposes:

5. Divorces decreed at the separate domicile of either spouse, if the respondent is given procedural due process.¹²⁹

The following divorces may and should be decreed with due process of law, and may and should be entitled to full faith and credit for some purposes, or to full faith and credit for all purposes.

6. Divorces decreed at the residence of either spouse (the domicile of neither) if the respondent is given procedural due process.¹²⁹

The following divorces are not decreed with due process of law, are not entitled to full faith and credit, and may not be given voluntary recognition as a matter of comity.

7. Divorces in which the respondent is not given procedural due process.

¹²⁸Conclusions Nos. 3 and 4 are stated separately for the following reason: The accepted doctrine is that the right to alimony is *in personam*. It may be that jurisdiction to decree alimony should not rest on involuntary subjection to the personal jurisdiction of the forum through mere physical presence in the State, which allows of service of process *in personam*. If so, conclusion No. 4 should be placed in the second category, with No. 5.

¹²⁹This conclusion could be stated, under the laws of the several States as they now are in force, in terms of "divorces decreed at the domicile of neither spouse." It is stated in terms of the "residence of either spouse" *e magna cautela*, for the following reason: It is conceivable that one of the States will take the final step in the competition for divorce and business, and following some of the Mexican states, adopt the device of the "mail-order" divorce. Should that happen, it will be necessary to determine the validity of a divorce decree rendered without the presence of either party for examination by the court, upon appearance by attorney only.

ARE LAWYERS PERFORMING SERVICES ESSENTIAL TO THE COMMUNITY OR FOR THE WAR EFFORT#?

*Christopher B. Garnett**

It is recognized that there is a tendency among some thoughtless people to join Jack Cade in the claim that lawyers do not have a place in society and that the profession of law should be abolished. "Nay, first let's kill all of the lawyers." It is also well known that in the totalitarian states, since there is no such thing as the liberty of the individual, the need for a lawyer does not exist. But in this country, as long as we maintain the rights which are guaranteed by Magna Carta and the Bill of Rights, as long as the ancient high prerogative writ of *habeas corpus* exists to enable the individual to obtain relief from illegal confinement and to liberate one who has been imprisoned without sufficient cause as long as we recognize the four freedoms as essential to the well-being of society, just so long will there be need for the profession of law. When, therefore, a department of our government, either expressly or by inference, affirms that the profession of law does not conduce to the well-being of society and is not essential to the winning of the war, it becomes the duty of every patriot to examine the philosophies underlying such instrumentalities in order to determine whether the totalitarian theory is not beginning to permeate our legal structure.

In one OPA rationing order,¹ relating to mileage rationing for gasoline, the former director has prescribed what persons are entitled to preferred mileage in the use of automobiles for passenger purposes, and has enumerated twenty classes of society to whom the privilege is granted.

These classes include:

- (1) officers or agents of the federal, state, local or foreign governments;
- (2) school teachers and officials and persons transporting pupils or teachers;
- (3) mail carriers;
- (4) carriers of newspapers or news reels; and
- (5) physicians (including dentists, osteopaths and chiropractors and midwives);
- (6) farm veterinarians at agricultural establishments;

#Submitted to Hon. Prentiss M. Brown, Administrator of the Office of Price Administration, February 19, 1943.

*Member of Virginia State, District of Columbia, and American Bar Associations; B.A., M.A., Univ. of Virginia; LL.B., Univ. of Richmond.

¹OPA Rationing Order, No. 8, § 1394.7706.

- (7) nurses and medical internes;
- (8) embalmers;
- (9) practicing ministers and religious practioners;
- (10) farmers;
- (11) transporters of farm workers, commercial fishermen, seamen or marine workers;
- (12) workers at
 - (a) naval or military hospital establishments;
 - (b) common carriers;
 - (c) public utilities;
 - (d) industrial, extractive or agricultural establishments, essential to war effort;
- (13) authorized agents of governments or of management or labor engaged in transportation for the purpose of maintaining peaceful industrial relations, or to recruit workers;
- (14) engineers, architects and technicians;
- (15) members of the armed forces of the United States or State military forces;
- (16) persons engaged in messenger service or in the delivery of telegrams;
- (17) persons engaged in scrap business.

No attempt has been made to insert here the limitations or restrictions upon the different classes, but it is evident that persons who are granted special privileges are considered as "performing services essential to the community or to the war effort."

These regulations and those first issued have been studied for the purpose of seeing whether the philosophy which lies at the basis of the divisions of society entitled to preferred mileage provided any category which would include a lawyer; but this search has been in vain. As indicated above, the privileged categories include the other learned professions of medicine and religion; they include engineers, architects and technicians, embalmers and midwives, but there is no category which can be construed as including lawyers. It would seem that the Office of Price Administration looks upon a lawyer as a wart on the nose of society which ought to be cut off.

An examination of the classification would seem to indicate that the categories therein included are considered essential to the welfare of the

community or to the war effort. This phrase is used as a limitation in defining some of the classes entitled to preferred mileage; and, from the enumeration of those who are excluded from the privilege of preferred mileage as well as by ascertaining those who are omitted from the privilege, it is evident that the services of those excluded and of those omitted are not considered essential to the community or to the war effort. For instance, it is specifically provided that preferred mileage may not be allowed to any person while engaged in promotional, merchandising or sales activities or wholesale or retail delivery, or to any person for the repair, maintenance, installation or construction of decorations or decorative equipment, or of novelty, amusement or entertainment devices, or of portable household equipment or furniture, or for landscaping. In the same, on excluded categories, the OPA has put salesmen, both retail and wholesale, as a class who are not essential to the community or the war effort.²

Just why a veterinarian is entitled to preferred mileage when his services are given at an agricultural establishment, but not while he is engaged in private practice, does not seem clear.

The first draft of these regulations provided that *public* school teachers and *public* school officials were entitled to preferred mileage, but by inference excluded the teachers and officers in private and parochial schools. Very wisely this unwarranted distinction has been abolished and the revised regulations have given preferred mileage to *all* school teachers and *all* school officials, but *only when they travel to more than one recognized educational institution*.

Just why a minister is entitled to preferred mileage to enable him to meet the religious needs of the locality which he serves, but not to go from his home to his place of worship, may be explained by some quirk of the brain of the person drafting the rule, but it does not have any rational explanation to the ordinary mind.

Why is it that a lawyer's duties and functions are classified by the Office of Price Administration as not essential to the community or to the war effort, while the functions of a minister, or of a physician including osteopaths, chiropractors and midwives stand in a higher category, as do the functions of an engineer or architect or technician?

It is the purpose of this paper to examine the functions and duties of a lawyer engaged in the practice of his profession, with a view, if possible, of determining whether, under the present state of society, these functions may be dispensed with, and the lawyer, as a member of one of the oldest and most honored of the learned professions, may be considered unnecessary to the well-being of society and not essential to the war effort.

²OPA Rationing Order, No. 8, § 1394.7706, q.

In order to determine the question whether the activities and duties of lawyers conduce to the well-being of the community, and whether they are essential to the war effort, it is necessary to consider the nature of the obligations and duties of lawyers and of the activities in which they are habitually employed.

The functions of a lawyer may be divided into two classes, first, those functions which belong to him as an officer of the court, and, second, those functions outside of official duties, in which lawyers have been habitually engaged affecting the well-being of society.

Every lawyer who is admitted to the bar becomes an officer of the court, and as such, is required to take an oath to support the Constitution and laws of the United States Government, the Constitution and laws of his State, and to honestly demean himself in the practice of law and to the best of his ability to execute his office of attorney at law.

It is evident, therefore, that the functions of a lawyer, being an officer of the court, are as broad and as far-reaching as the functions of the court itself, and the definition of his duties and obligations must be found in the whole field of the law.

It is not unusual for the ordinary man to emphasize too much the duties and obligations of lawyers relating to the preparation and trial of cases in court. This is the most spectacular part of the lawyers' duties, but one who limits his view of the duties of a lawyer to this field does not get a very comprehensive idea of his duties and obligations.

In the field of criminal law the most important part of a lawyer's work is connected with the preparation and trial of cases in court, but in the field of civil law exactly the opposite is true. To mention only a few of the divisions of the civil law the questions growing out of domestic relations, such as parent and child, guardian and ward, husband and wife, marriage and divorce; those growing out of the death of an individual, the preparation and construction of wills, the descent and devolution of property, the appointment and regulation of personal representatives of decedents and of other fiduciaries; the complex questions growing out of contracts and their breach; those growing out of torts; those arising in the complex field of taxation, is sufficient to show that matters are involved which do not require the interposition of the court for solution. The fact that there is an appeal to the court is a great motive in bringing men to fulfill their obligations under the law, but in the case of an able and conscientious lawyer, by far the greater part of his work is the solution of questions without such an appeal.

The duties and obligations of lawyers are not confined to the settlement of disputes and the trial of cases. Their duties are becoming more and more prophylactic in their nature; and, in addition to the duty of repre-

sensation of clients in proceedings in court, their duties relate to advice and guidance, whereby clients may be prevented from violations of the law and may be advised how they may conform their business practice and their daily lives to the rules and regulations laid down by administrative bodies, such as the OPA and the other numerous alphabetical organizations composing a large part of the federal government.

Historically the lawyer in the United States has never been content to limit his duties to society and his professional activities within the practice of the law as found in the courtroom and in the representation of clients. It was a lawyer who wrote the Declaration of Independence. It was another lawyer who wrote the Virginia Bill of Rights. The Constitution of the United States was the work of lawyers and largely the work of one lawyer, James Madison, who is familiarly known as the father of the Constitution. The bill for the establishment of religious freedom in Virginia was drafted by a lawyer, and it was the clarion cry of another lawyer who summoned the people of the thirteen original colonies to declare their independence of Great Britain. All that is permanent and fundamental in the Atlantic Charter and in the Four Freedoms is based upon the work of lawyers.

Surely with this background and history the time has not yet come in the development of the powers of government and the duties and obligations of the citizen when the lawyer may be classified as not essential to the welfare of the community nor to the present war effort.

In a primitive society lawyers are not needed. The original political and economic unit was the family under the autocratic control of the patriarch. Property was communal; the individual possessed no rights and wished none; all offenses were defined and punished *ex post facto*. As the size of the family-state increased, it became an amorphous group, still under the absolute autocracy of the oldest living male, and still a complete communism. When the size of the group became too unwieldy for effective personal tyranny, it dissolved into households, and from these at long last the individual disentangled himself, acquired a portion of the common property and an individuality of his own. Then, and not until then, did the function of the lawyer arise to make for individuals the adjustments among themselves which they could not make without assistance.

If our government is approaching the totalitarian ideal, and we are indeed reverting into a primitive communism, if the price of individual personal freedom and individual enterprise has become too high to pay, then the function of the lawyer is disappearing along with all of the other achievements of civilization.

If we have not reached that lamentable stage, if the grasping hands of the totalitarian state have not seized the body politic, then the lawyers' work of adjusting men's relations, the one to the other, and the relations

of the individual to the governments, is still the most important function of human life.

It is not without significance that, among many primitive communities, the earliest lawyers were priests. A lawyer of today who understands his position in the community and wishes to preserve civilization must still conceive of himself as a priest, a priest in the temple of justice; for unless he exercises sacerdotal functions with the highest possible sense of the dignity of his calling, he will deserve the oblivion to which there appears to be some tendency to consign him. When that time comes he will, like Samson of old, pull down the temple over his head and the Philistines who have put out the eyes of the law will perish with the law.

GOVERNMENTAL ECONOMIC CONTROLS IN WAR AND PEACE

Donald S. Frey*

Lawyers can make their greatest contribution toward a just and durable peace through aiding American private industry in making plans now for its operations in the post-war world. With respect to each client's specific interests, an analysis of the various wartime and peacetime governmental economic controls must be made.¹

The problem that faces Government and Industry since Pearl Harbor is to gear our free competitive system for a tremendous armament production program in a heretofore inconceivably short space of time. To meet the constantly growing armament demands of the military, laws were enacted ordering private industry to give preference to all war orders.² Increasing shortages of war-important raw materials compelled careful governmental allocation of these scarce materials, channelling their consumption for all war orders in preference to civilian orders.³ These shortages are compelling governmental curtailment of civilian production and "rationalization" of various industries in the forms of simplification and standardization of items in order to reduce the consumption of war-critical materials and increase armament production.⁴ A rising national income, as a result of more employment, longer working hours and higher wages and salaries, offset against a decreasing amount of consumer goods and services to buy, have compelled governmental control of the prices of all goods and

*Member of New York Bar; Special Counsel to the War Production Board; LL.B., Yale; and author of various articles in legal periodicals.

¹Fisher, *Anti-Trust During National Emergencies* (1942) 40 MICH. L. REV. 1161; Hale, *Control Over Distribution: Monopoly Aspects of Restraint Upon Distributors and Producers* (1942) 14 MISS. L. J. 170; Hynning, *Price Control and the Profit System* (1942) 9 U. OF CHI. L. REV. 561; Lauterbach, *Economic Demobilization in Great Britain After the First World War* (1942) 57 POL. SCI. Q. 376; Rieve, *Priorities Present Big Problems for Post War Planning Now* (1941) 31 AM. LAB. LEG. REV. 159.

²Priorities and Allocations Act, 54 STAT. 676, 41 U. S. C. A. § 2a (Supp. 1940), as amended by 56 STAT. —, 50 U. S. C. A. § 633 (Supp. 1942); WPB Priorities Regulations Nos. 1, 3 and a host of "P" orders (granting preference ratings for purchase of materials to be used in essential industries); C. C. H. War Law Serv. P. 36,001-36,356 (various "P" orders). A supplemental statute provides that the President may place defense orders through the Army and Navy Departments with any company capable of doing the required work, and such orders must be given preference over other orders. If the company refuses to do the work, or even to give preference to the order, the government may take immediate possession of the plant and operate it. Conscription of Industry Act, 55 STAT. 742, 50 U. S. C. A. § 721-724 (Supp. 1942).

³Priorities and Allocations Act, 54 STAT. 676, 41 U. S. C. A. 2a2 (Supp. 1940); C. C. H. War Law Service P 35,021-35,467 (host of "P" orders which allocate the critical materials); Priorities Regulation No. 1, § 944.10; C. C. H. War Law Serv. P 30,901.

⁴See C. C. H. War Law Serv. P. 37,001-37,403 for host of "L" orders which curtail civilian production and provide standardization programs.

services and the freezing of wages and salaries in order to avert inflation.⁵ The profits of private industry on government contracts have come under careful supervision in the firm belief that no excessive profits should be made from the war and that governmental expenditures should be reduced as much as possible.⁶

These wartime objectives must be thrown against the background of our pre-war governmental economic controls which are still the law of the land. Expressed by federal legislation for over fifty years, there exists in the United States a policy that private industry must not adopt practices which lead to an "unreasonable restraint of trade."⁷ Examples of "unreasonable restraints of trade" are combinations of private interests which agree to fix prices and/or restrict production, and companies which practice economically unjustified price discriminations on various customers. For almost thirty years, the government has also prohibited "unfair methods of competition and unfair trade practices."⁸ In addition to its objective

⁵Emergency Price Control Act, 56 STAT. 23, 50 U. S. C. A., § 901 (Supp. 1942), as amended by 56 STAT. 23, 50 U. S. C. A. § 901b (Supp. 1942). The President by Executive Order No. 9250 assigned the function of stabilizing wages and salaries to a newly created Office of Economic Stabilization. Wage and salary increases and decreases are passed upon by the National Labor Board or by the Treasury Department. Penalties for violation of the act are \$1,000 or prison for not more than one year, or both. See Regulations of Economic Stabilization Director, Prentice-Hall Labor Serv. P 6005-7401.

⁶Sixth Supplemental National Defense Appropriation Act (Renegotiation of War Contracts). 56 STAT. 245, as amended, 56 STAT. 982, 41 U. S. C. A. note prec. § 1 (Supp. 1942).

⁷Sherman Anti-Trust Act, 26 STAT. 209 (1890), 15 U. S. C. § 1-7¹ (1937) declared illegal every contract, combination or conspiracy in restraint of trade or commerce among the several states or foreign nations. The act is interpreted in the light of the English common law which has always prevented restraints on free competition in business which tended to restrict production or raise prices to the detriment of purchasers of goods and services. However, actual combinations or mergers of several companies, which result in decreased overhead and costs, thereby reducing prices and only incidentally making competition more difficult for a less favored competitor, are not illegal. *Maple Flooring Manufacturers Ass'n. v. United States*, 268 U. S. 563 (1925) (trade association meetings). The Sherman Anti-Trust Act was amended by the Miller-Tydings Act, 50 STAT. 693, 15 U. S. C. A. § 1 (Supp. 1937), which declared legal "minimum price for resale agreements" between a producer or distributor and the retailer, provided certain other conditions were fulfilled including the validity of such contracts in the particular state involved.

The movement toward the legalization of this so-called "vertical type" of Resale-Price Maintenance Agreements was begun in state legislatures in the form of series of State Fair Trade Acts. N. Y. Laws 1909, c. 25, § 24a; Miss. Laws 1938, c. 348. The objective in legalizing these agreements, as distinguished from the still illegal "horizontal agreements" between manufacturers or distributors of similar commodities to fix prices on all such similar commodities, was to protect the producer's or distributor's trade mark on the resale of the product against public disfavor if the price for such item should be cut by various retailers. Such "vertical agreements" did not injure competitors.

⁸The Clayton Anti-Trust Act, 38 STAT. 730, 15 U. S. C. § 12 (1914) declared illegal "exclusive dealing" contracts where in consideration of a favored price for the purchase of certain products the buyer agreed not to deal in the competitor's products, provided such contracts substantially lessen competition or tend to create a monopoly. The objective of this law is that the trade channels of distribution of goods and services must be unrestricted and individuals must be able to choose their

of maintaining a competitive system and thus of penalizing any act seriously lessening competition as injurious to the public interest, the government has prohibited certain unfair or deceptive trade practices within the competitive system, which, although they may not have tended to lessen competition, were directly injurious to the buying public.⁹ Examples of such practices requiring governmental controls were acts of disparagement of competitors or competitive products and false advertising of foods, drugs and other products.

By force of the Constitution itself, there has also been enforced a policy which appears at first blush to be inconsistent with our policy of preserving a free competitive system, namely, our patent laws which in effect make valid a limited monopoly.¹⁰ The existence of these laws reflect an essential principle of our free competitive system, namely, the encouragement of individuals to risk time and savings to improve the commodities and services of industry for the public good and with the hope of reasonable profit to themselves.

There was also apparent before Pearl Harbor a legislative trend to apply these governmental economic controls to specific industries on an "industry basis."¹¹ The National Recovery Act (NRA), which was a short experiment in governmental supervision of cooperative groups of competitors under Codes of Competition with agreed prices and carefully allocated production, never abolished these pre-war economic controls; and after the NRA was declared unconstitutional,¹² these now traditional laws were again vigorously enforced.

own suppliers and customers, for such condition is a necessary component of a free competitive system. Contracts between members of private industry that do affect restrictions on the ordinary trade channels have been carefully examined by the courts for the reason that some such contracts have compensating advantages for the general public, as for example, the assurance of better quality.

The Clayton Act, *supra*, was amended by the Robinson-Patman Act, 49 STAT. 1526, 15 U. S. C. § 13-13b, 21a (1936). This amendment declared illegal any discrimination in price between different purchasers of commodities of like grade and quality where the effect may be substantially to lessen competition or tend to create a monopoly. An illegal discrimination is an economically unjustified price differential, that is, such a differential which (1) does not represent primarily a difference in grade, quality, or cost of manufacturing, selling or delivery, and (2) is not justified by "emergency factors" such as marketability of the goods involved, changing market conditions, or local competition.

⁹The Federal Trade Commission Act, 38 STAT. 717, 15 U. S. C. § 41-51 (1914), declared illegal all "unfair methods of competition" in commerce. An amendment in 1938 declared illegal all "unfair or deceptive acts or practices in commerce" whether or not in competition. See *International News Service v. Associated Press*, 248 U. S. 215 (1918), for special development of this law.

¹⁰The Patent Law, 53 STAT. 1212, 35 U. S. C. A. § 31 (Supp. 1939) grants a patentee complete control over the production and sale of the patented article for a limited number of years. Those contracts in which the patentee fixes the price at which the patented article may be sold are valid, but a patentee cannot carry the restrictions further to the resale prices. Agreements by two or more patentees to pool their similar patents and restrict their production or fix prices are invalid.

¹¹Wool Products Labeling Act, 54 STAT. 1128, 15 U. S. C. § 68 (1936); Bituminous Coal Act, 50 STAT. 72, 15 U. S. C. § 828 (1937).

¹²*Schechter Poultry Corp. v. United States*, 295 U. S. 495 (1935).

FREE COMPETITION VERSUS INCREASED ARMAMENT PRODUCTION

The major problem for private industry today is to preserve the essentials of a free competitive system while complying fully with the new wartime economic controls. As sort of liaison officers between government and industry, lawyers should consider it their duty to make this wartime relationship workable, without the sacrifice of our free competitive system.¹³

There is a fairly well established rule of law that where an entire industry is made subject to regulation under supervision of some administrative body, combinations and agreements approved by the supervisory body are exempt from the anti-trust laws.¹⁴ However, there was a justifiable fear on the part of business men that they might be prosecuted under the anti-trust laws for their activities pursuant to the wartime regulations, in view of the decision in the Madison Oil Case,¹⁵ where certain companies were held guilty for actions authorized under NRA. To remove this fear, a law was passed on June 11, 1942,¹⁶ which declared that any action on the part of members of private industry, which is certified to the Attorney General by the Chairman of the WPB to be "requisite to the prosecution of the war," shall not be prosecuted under the anti-trust laws. This procedure is being followed.¹⁷

(a) Problems of Production and Distribution

We face a serious problem of speeding up and simplifying the production and distribution operations of our national economy, and at the same time of preventing the forming of any monopolistic agreements by competitors working under the various prescribed "rationalization" plans. The existence of this very problem distinguishes our "rationalization" plans from the "rationalization" plans in Germany and Japan.

The "Priorities and Allocations Act"¹⁸ gave the President power to allocate all materials and facilities necessary for war purposes in such manner as he shall deem necessary in the public interest. The President delegated his authority to the War Production Board,¹⁹ and the WPB in

¹³See articles cited *supra* note 1.

¹⁴Interstate Commerce Act, 24 STAT. 380, 49 U. S. C. § 5, 20a (1887); Civil Aeronautics Act, 52 STAT. 1001, 49 U. S. C. § 488, 489, 492 (1938).

¹⁵United States v. Socony-Vacuum Oil Co., 310 U. S. 150 (1940).

¹⁶Pub. L. No. 603, 77th Cong., Sess. 56 STAT. 781, 15 U. S. C. A. § 16 (Supp. 1942) (suspending the statute of limitations applicable to violations of anti-trust laws until June 30, 1945).

¹⁷Certificate No. 29, Fed. Reg. (Feb. 3, 1943), permits two large competitors to exchange plans, drawings, and designs and pool manufacturing information. The recent operations of the Controlled Materials Plan calls for closer cooperation between the large prime contractor and his suppliers which may lead to charge of agreements in restraint of trade. See Regulation No. 1 of C. M. P., C. C. H. War Law Serv. P 2500.

¹⁸See *supra* note 2; *Industrial Mobilization Plan*, Revision of 1939, War Dep't Release.

¹⁹Executive Order No. 9024 (1942).

turn delegated certain of its powers such as rationing to the Office of Price Administration.²⁰ Before and after the issuance of their multitude of regulations and orders, the WPB and OPA officers have consulted with various Industry Advisory Committees, consisting of representatives from competitors in each industry. Sometimes, for example, the plan of simplification of a product is agreed upon and proposed by the industry representatives, but to prevent any charge of monopoly or restraint of trade, the order compelling such simplification is issued by the war agency.

Under the WPB "Rationalization Plan," competitors have been ordered to pool their productive facilities. Simpler production jobs are being assigned to smaller units and the facilities of the larger integrated companies are being released for the more complex jobs. However, the standardization phase of the program is not pushed to the point where new improvements are blocked.²¹ Certain concentration plans are running afoul of labor shortage problems.²² Various industries have been requested to stop cross-hauling practices by "pooling and zoning" their freight.²³

What products may be exported and imported is under the control of the Board of Economic Warfare. These BEW controls are so much a part of the military strategy of economic warfare that the only objectives that are apparent from an examination of the regulations are that as much of the United States' resources as possible are used to help the United

²⁰Executive Order No. 9128 of April 7, 1942, authorized WPB to delegate its rationing powers to OPA. Directive No. 1 of WPB generally delegated such rationing authority. Supplementary Directives of WPB have given OPA certain powers to ration specific commodities such as tires, vehicles, typewriters, sugar, gasoline, fuel oil, refrigerators, meats and rubber footwear. During the coming months, rationing of many other commodities is expected and such orders will play a larger part in the operations of companies. Of special importance in these orders are the provisions permitting special allotments of the rationed article and requirements regarding the use and care of the rationed article.

²¹OPA has also pressed for standardization of products because it can then place more conveniently dollar and cent ceiling uniformly as a substitute for the individual March ceilings or of some other date. Objection has been made that this method is causing OPA to ignore the higher quality of some brands and to remove the incentive of improvement.

²²The War Manpower Commission, established by Executive Order No. 9139 (1942), is seeking to cope with the various manpower shortages. Prentice-Hall, Fed. Labor Serv. P 601-2001.

²³WPB General Transportation Order No. T-1, 8 Fed. Reg. 1352 (Feb. 2, 1943), Certificate 27 protests any plan that has been approved by WPB for pooling of tank-cars by chemical and food producers against anti-trust charges. Such zoning was made compulsory in the sugar industry. The objectives of the Price Control Act require the OPA to investigate closely the practice of customary allowances, discounts and other price differentials. Some members of private industry, fearing that their practices in this connection were not in full compliance with the Robinson-Patman Act, 52 STAT. 446, 15 U. S. C. § 13c (1938), were hesitant in complying with the requirement of making public a list of all customary allowances, discounts and other price differentials. The OPA has ruled that "advertising allowances," i.e., promotional services by a distributor, are not covered by the GMPR and are therefore not to be considered as an element in the price. However, such allowances are frozen where they were given, regardless of the promotional services rendered. OPA Release No. 3056.

Nations, and every precaution is taken to prevent American foreign sales from benefiting the enemy.²⁴

(b) Problems of Profit Limitations

There is also the equally serious problem of averting inflation through placing ceilings on goods, services, wages and salaries, and keeping to a minimum mounting government expenditures through eliminating excess profits from government contracts and imposing excess profits taxes,²⁵ while at the same time preserving the profit incentive to encourage increased production.

The Emergency Price Control Act,²⁶ which became law on January 30, 1942, gave the Price Administrator power to establish maximum prices for the sales of practically all commodities and services. Among the authorized methods for the establishment of these price ceilings is the reaching of a voluntary agreement by members of an industry with the Price Administrator.²⁷ Such price agreements are free from anti-trust prosecution, provided copies of such agreements are sent to the Attorney-General.

The most important single OPA Regulation is the General Maximum Price Regulation, known as "GMPR." With several exceptions, this Regulation established the ceiling price on all goods and services (unless covered by special regulations) at the highest price charged for the particular commodity or service in March, 1942.²⁸ Since the U. S. Government today is private industry's largest customer, a special procedure is provided for the adjustment of ceiling prices on goods sold to the government.²⁹ The liability of government procurement agencies for purchasing above the established ceiling prices is removed.³⁰ Price ceilings are only raised where no "reasonable profit" is permitted the seller.³¹

The Renegotiation of Government Contract law authorized the War, Navy and Treasury Departments and the Maritime Commission to ascertain and eliminate excessive profits from contracts and subcontracts made for their respective departments. By this legislation all sums in excess of a

²⁴54 STAT. 714, 50 U. S. C. A. § 99, 701 (Supp. 1940) (statutory authority for BEW). The BEW was established by Executive Order No. 8839.

²⁵Int. Rev. Code § 600-604 (1942).

²⁶Earley, *Economic Problems of Price Control* [1942] WISC. L. REV. 334-54; see *supra* note 5.

²⁷Price Control Act, 56 STAT. 23, 50 U. S. C. A. § 901 (App. 1942), see *supra* note 5.

²⁸In certain cases, retailers who on the frozen date were not complying with the State Fair Trade Act were first prevented from complying with their resale price maintenance contracts, *supra* note 7. *Park & Tilford Import Corp. v. Rubin*, 108 N. Y. L. J. 1222, N. Y. Sup. Ct., Oct. 28, 1942 (price ceilings no defense in violation of N. Y. Fair Trade Law); GMPR § 1499.18(d) (authorizing adjustment upon showing that petitioner's prices at effective date were below fair trade minimum); *Schreier v. Siegal*, 265 App. Div. 36, 37 N. Y. S. (2d) 624 (1st Dept. 1942).

²⁹OPA Supplemental Reg. 4.

³⁰OPA Supplemental Order No. 7.

³¹See *infra* note 32 (same problem exists in government contract renegotiation).

fair margin, under all circumstances of the individual case, constitute excessive profits to be recaptured, subject to the understanding that reasonable profits should be allowed to encourage an uninterrupted, efficient and maximum production of war goods on a low cost basis. No general uniform standard of what constitutes a "reasonable profit" is possible because the factors of investment, efficiency, government assistance, turnover, and inventive contributions differ in each case. Only a general statement can be made that the financial structure of each private enterprise must not be harmed during the war.³²

Parallel to the governmental control over profits, the Act of October 31, 1942,³³ provided that federal officials may adjust excessive royalty rates on patents. Legislation has been proposed to compel the licensing and condemnation of patents where such action would serve the war effort, and to prohibit the granting of injunctions on alleged patent infringements by producers of critical materials where restraint would interfere with the war. Enemy-owned patents, which amount to over 50,000 patents representing some of the finest research achievements of modern science, may be licensed to any legitimate business concern on a royalty-free non-exclusive basis for the life of the patent. Effort is being made to bring these patents to the attention of the small business unit as well as the large one, thus building up the national productive capacity and establishing a sound business structure for the post-war world.³⁴

(c) The Problems of Enforcement

Two currently serious enforcement problems are the attempts of certain basic industries to hamper expansion because of the fear of their loss of domination after the war and of their excess productive capacity, and the illegal use by other industries of patents to control the production of basic materials. A War Frauds Unit has also been established within the Department of Justice to study complaints of collusive bidding and false representations.³⁵ In addition, a Small Business Unit has been established to handle complaints of "small business" men.³⁶

³²Explanation of Principles for Determination of Costs under Government Contracts, War-Navy Dep't., April, 1942. A further objective of cutting costs is not to leave private industry at a disadvantage with other nations after the war in the world market. Cost cutting is effected by "forward pricing," cutting incentive of increased profit rate, and industry "rationalization."

³³56 STAT. 1013, 35 U. S. C. A. § 89 (Supp. 1942).

³⁴See letter of Leo T. Crowley, Dec. 7, 1942, to the President, Journal of Commerce, Dec. 21, 1942.

³⁵Ginsburg, *The Emergency Price Control Act* (1942), 9 LAW & CONT. PROB. 22, 55.

³⁶Small business has been hurt by government procurement which for reasons of speed and volume has been channelled into larger companies, which were already on an assembly line basis. Charges of discrimination on the part of procurement officers and on large institutions anxious to sell their depleted stocks only to large customers are being investigated. Where "rationalization" is not necessary, the WPB through the Smaller War Plants Corporation, authorized by the Small Business Mobilization

Because the objective of increased armament production is all-important and must be attained, it was only reasonable that Congress should impose serious penalties for violations of the statutes or regulations carrying out such objective.³⁷ In contrast to this action, various prosecutions for violations of certain of the pre-war economic controls that seek to maintain free competition were postponed where it was believed that the time consumed at the trial by the executives of the various indicated companies should not now be taken from the war effort.³⁸

As a means of aiding enforcement, the wartime regulations have an elaborate procedure for keeping records,³⁹ filing reports,⁴⁰ and making appeals.⁴¹ More than ever before, the lawyer who counsels a business corporation in this war period must have a full understanding of the manufacturing, research and selling problems of his client in order to completely represent it in the handling of its reports and petitions for relief before these government agencies which control the very life of the corporation.

ACT. 56 STAT. 351, 50 U. S. C. A. § 1104 (Supp. 1942) has made a special effort to spread war contracts to the small business men. The act is interpreted as broad enough to give power to force subcontracting on the part of the large contractor.

³⁷Emergency Price Control Act, 56 STAT. 23, 50 U. S. C. A. § 901 (Supp. 1942). Priorities and Allocations Act, 54 STAT. 676, 41 U. S. C. A. § 2a5 (Supp. 1940) WPB and OPA Suspension Orders deny violators priority or rationing assistance, respectively. United States District Courts have jurisdiction to enjoin violators and to hear criminal suits. Penalty for violating WPB orders is \$10,000 fine or prison for not more than one year, or both. OPA penalty is \$5,000 fine or prison for not more than one year, or both. WPB and OPA violators are also subject to action under the Criminal Code, 40 STAT. § 1015, 18 U. S. C. § 80 (1918) (fraudulent representations to the government), carrying a penalty of \$10,000 fine or prison for not more than ten years, or both. Violators are also publicized as engaged in "unconscious sabotage of the war program."

³⁸The War or Navy Department may request the Attorney General to postpone the trials where, in their judgment the trials will interfere with war production. Various arrangements are also made to postpone anti-trust investigations. See C. C. H. Trade Reg. Serv. P 1162-1169 for names of various companies against which prosecutions were postponed and reasons stated for postponement.

³⁹Priorities and Allocations Act, 54 STAT. § 676, 41 U. S. C. A. 2(a)(2), (Supp. 1942); Priorities Regulation No. 1, § 944.15; Price Control Act, 56 STAT. 23, 50 U. S. C. A. §901-905, (Supp. 1942); GMPR, § 1400.11, 1499.12.

⁴⁰Priorities and Allocations Act, 54 STAT. 676, 41 U. S. C. A. 2a2 (Supp. 1940); Priorities Regulation No. 1 § 944.17; Price Control Act, 56 STAT. 23, 50 U. S. C. A. § 901-905 (Supp. 1942). Routines must be established to get necessary data from the persons in the company responsible so that forms may be prepared and sent to Washington on time. Confidential treatment of both OPA and WPB reports are protected by the respective acts, Price Control Act, *supra*, § 902h; Priorities and Allocations Act, *supra*, § 2a4.

⁴¹WPB Release 1264 (June 2, 1942); Priorities Regulation No. 1, 944.19; Priorities Regulation No. 16 (providing for procedure for WPB appeals; Procedural Regulation No. 9 (rationing appeals); Revised Procedural Regulation No. 1 (price ceilings appeals); GMPR § 1499.18. The Price Control Act, 56 STAT. 23, 50 U. S. C. A. § 923 (Supp. 1942), provides that any person aggrieved by denial or partial denial of the protest may within thirty days file a complaint with the Emergency Court of Appeals. This Court consists of three federal court judges. Any particular regulation in question may be enjoined or set aside in whole or in part if the complainant establishes to the satisfaction of the Court that the regulation is not in accordance with law or is arbitrary or capricious. See Rules of Court, effective May 20, 1942.

Certain judicial opinions have been handed down concerning these new wartime economic controls. Many cases have arisen from the provision in both the WPB and OPA regulations which provides that the restrictions should be adhered to by the parties regardless of any contract such parties may have entered into prior to the issuance of the regulations.⁴² The courts have already imposed heavy penalties for violations of the various war regulations.⁴³ Much has been written on the constitutionality of these controls. They all seem valid under the broad sweep of the war powers.⁴⁴

PLANNING FOR POST-WAR

The major problem for private industry in tomorrow's so-called "Age of Light Metals" is to produce, while maintaining full employment, a quantity of goods and services of sufficient value to absorb the annual billions of dollars of income resulting from full employment.⁴⁵

In domestic commerce, price ceilings will probably remain on many scarce commodities until the natural forces of competition reasonably control the prices. When the majority of pre-war suppliers are prepared to meet again the demands of consumers, governmental control of prices should be removed. We may expect to see the development of more humane concepts of what constitutes "unfair trade practices." Certain new peacetime controls may be adopted such as the adoption of the policy that full

⁴²A prior contract, the performance of which is in conflict with a subsequently issued WPB or OPA regulation, becomes invalid. *Export Syndicate v. Dilsizian Inc.* 36 N. Y. S. (2d) 868 (1942); *Neuberg v. Payne Co.* 37 N. Y. S. (2d) 366 (1942); *Littlejohn v. Shaw*, 159 N. Y. 1.88 (1942); *Swanee Fabrics v. American Bleached Goods Co. Inc.*, 108 N. Y. L. J. 148, N. Y. City Cts., July 18, 1942 (delivery under OPA defined); *Sanders v. Lowenstein & Sons*, 264 App. Div. 367, 35 N. Y. S. (2d) 591 (Dep't 1942) (arbitration clauses); *In re Kramer & Uchitell Inc.*, 288 N. Y. 467, 43 N. E. (2d) 493 (1942) (condition precedent in granting allocation request); *In re Kahn & Feldman Inc.*, N. Y. Sup. Ct. App. Div. 1st Dep't., Aug. 11, 1942.

⁴³*Brown v. Mars Inc.*, D. C., W. D. Mo., No. 1366; *Byrnes v. Flanagan*, 48 Fed. Supp. 703 (App. D. C. 1943); *Hall v. Chaltis*, Munic. C. A. D. C., No. 41, March 2, 1943; *Henderson v. Sonken-Galamba Corp.*, D. C., W. D. Mo., No. 1200; *Henderson v. Frank D. C., W. D. Pa.*, Misc. No. 1158, Aug. 20, 1942; C. C. H. War Law Serv. P 50,901, 50,912, 50,941, 50,944, 40,945.

⁴⁴Production and inventory controls of WPB, as distinguished from the priority, preference rating and materials allocation orders, were not used in World War I and their validity has not been adjudicated. Price ceilings and wage and salary stabilization orders were also not present in the last war. The courts during the war will hesitate to substitute their own judgment for that of the President's as to what are the proper means for procuring the uninterrupted production that seems to be essential to national survival. The ballot box rather than the courts must be counted upon to check and correct any Presidential action. *Reach v. Johnson*, D. C., N. D. Ind.; *United States v. Macintosh*, 283 U. S. 605 (1930); *Rubenstein Inc. v. Charline's Cut Rate Inc.*, N. Y. Ch. Ct., Sept. 11, 1942.

⁴⁵C. C. H. War Law Serv. P 51,722. Many District Courts have already upheld the constitutionality of the Price Control Act in contrast to the *Reach* case above. *Brown v. Wick*, D. C., E. D. Mich., No. 3624; *Henderson v. Kimmel*, 47 F. Supp. 635 (S. D. Kan. 1942). Old precedents are *Highland v. Russell Car and Snow Plow Co.*, 279 U. S. 253 (1928); *Block v. Hirsch*, 256 U. S. 135 (1921).

employment of the people must be maintained at all times.⁴⁶ "Big business," which owes its size to efficiency and which makes products cheap through mass production, will not be condemned, but the cartel management of big business that deals in restrictive agreements and patent pools must be prohibited.

The previously discussed "rationalization" plans will result in post-war days in more goods for consumers at cheaper prices. A tremendous number of valuable inventions will have resulted from the war effort which will be developed by private industry for peace-time uses. The post-war world will see the continued increase in certain business fields of "cooperative associations" in which the consuming public are the owners. These associations are a fair challenge to private enterprise and a natural public safeguard against monopolistic practices such as the pegging of a price of a product or service at a figure unreasonably disproportionate to its cost. The patronage dividend features of these associations have not been destroyed by either public or private fixing prices.⁴⁷

In foreign commerce, there is much evidence that, if the United Nations are victorious, a somewhat similar pattern of governmental economic controls will be placed in operation. A system which permits both big and small business groups to function and prosper with equal opportunity for all newcomers and special incentives for production of improved and cheaper commodities and services is the only logical system to apply to the international field where big and small, rich and poor nations and groups will naturally strive for the supplies of raw materials and the markets of the world. Here again should be reflected the American ideal of "Equal Justice Under the Law." The operation of a competitive system in foreign commerce will provide a satisfactory beginning for an economic internationalism which is just as necessary for an enduring peace as some sort of political internationalism.

The Master Lend-Lease Agreements made by the U. S. with the United Nations are really mutual aid and economic pacts, not merely for the duration of the war. The United Nations agree to (1) the expansion of production and employment and the exchange and consumption of goods; (2) the elimination of all forms of discriminatory treatment in international commerce; (3) the reduction of tariffs and other trade barriers; (4) equal access by all states great or small, victor or vanquished, to all raw materials needed for their economic prosperity. The third point, of course, involves the putting of our goods into competition with goods

⁴⁶Two major problems to which lawyers should devote much attention are: first, the best method for the government to dispose of its vast holdings of supplies at the close of the war (see Editorial, *J. of Com.*, March 17, 1943); and second, the best method of canceling war contracts at the end of the war. (See, Article, *J. of Com.*, March 1, 1943).

⁴⁷*Midland Cooperative Wholesale v. Ickes*, C. C. A., Jan. 27, 1942, *cert. denied*, April 27, 1943.

produced under lower standards of living and injuring our recently developed synthetic raw-material industries such as rubber, chemicals and minerals. The practical thing to do is to have tariffs on the basis of a reasonable competition between imports and domestic production, and above all, have them equal to all nations. A system of flexible tariff provisions based upon relative cost of production at home and abroad would preserve fair competition of imports with domestic production.

In the World of Tomorrow, the important duty of lawyers will be to constantly clarify and expound for the benefit of clients and others alike these ramifying rights and duties of individuals, business units and nations which will flow from the application to the economic world of the principles of our free competitive system.

⁴⁸See *supra*, notes 10, 13, 18, 23. The tariff question raises the problem of government sponsored and financed business in foreign trade. In the days to come, great pressure will be brought upon the government to finance our merchant marine and our new airplane industry, but subsidies for exports can prove just as much of a foreign trade barrier as high protective tariffs against imports. We cannot fairly ask other nations to lift trade impediments while we pay bounties to push our own exports, because we do not trust the functioning of free competitive markets to provide us with adequate outlets for products abroad.

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR

VOL. XV

MARCH, 1943

NO. 3

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RECENT DECISIONS

UNFAIR COMPETITION—PRICE CUTTING WITH INTENT TO DRIVE COMPETITOR OUT OF BUSINESS—EFFECT OF MALICIOUS MOTIVE

In 1939, the plaintiff cleaned suits for 35c in his home county and for 40c in adjoining counties. At the same time the defendant was doing business in some of these counties, charging from 50c to 85c for the same work. The defendant's agent told the plaintiff that unless he would raise his prices to 75c the defendant company intended to break him if it took a couple of million dollars. In 1940, the defendant reduced its prices for this work to 20c and sent trucks into the plaintiff's home county for the first time with the result that the plaintiff's gross receipts fell off considerably. The plaintiff brought this action to recover damages for unfair competition, after the president of the defendant company told another cleaner that the 20c price would only be in effect until the defendant could put the plaintiff out of business and that he hoped to have him on the W.P.A. in less than two years. The circuit court refused to give a peremptory instruction in the defendant's favor and submitted the question of punitive damages to the jury, who found for the plaintiff. *Held*: Although the reduction of prices is an absolute right, one may not under the guise of exercising this absolute right indirectly interfere with the business of a third person where the exercise of that right is with the object of injuring the third person rather than primarily benefitting the person exercising the right. *Memphis Steam Laundry-Cleaners v. Lindsey*,—Miss.—5 So. (2d) 227 (1941).

The widely recognized principle of tort law that an intentional interference with a contract may be an actionable tort¹ has in recent years been extended by analogy to an interference with a prospective, advantageous business relationship.² The liability for inducing breach of contract is now regarded as but one instance, rather than the exclusive limit, of protection against unjustified interference in business relations.³ At a very early date in England tort liability for interference with prospective business advantages was recognized, especially where the interference resulted

¹*Dunshee v. Standard Oil Co.*, 152 Iowa 618, 132 N. W. 371, 36 L. R. A., N. S., 623 (1911); *Wheeler-Stenzel Co. v. American Window Glass Co.*, 202 Mass. 471, 89 N. E. 28, L. R. A. 1915F, 1076 (1909) (employment contract); *Beekman v. Marsters*, 195 Mass. 205, 80 N. E. 817, 11 L. R. A., N. S., 201, 11 Ann. Cas. 332, 122 Am. St. Rep. 232 (1907) (inducing valuable employees to leave the plaintiff's employ and to enter the defendant's service); *Japerson v. Dominion Tobacco Co.* (1923) A. C. 709, 92 L. J. P. C. 190; *Bowen v. Hall*, 6 Q. B. D. 333, 50 L. J. Q. B. 305 (1881); *Lumley v. Gye*, 2 El. & Bl. 216, 118 Eng. Rep. 749, 1 Eng. Rul. Cas. 707 (1852) (holding that it was a tort to induce an opera singer to break her contract to sing exclusively for the plaintiff and extending the rule of liability to non-tortious inducement).

²*Boggs v. Duncan-Schell Furn. Co.*, 163 Iowa 106, 143 N. W. 482 (1915); *Graham v. St. Charles St. Ry.*, 47 La. Ann. 214, 16 So. 806 (1895); *Louis Kamm, Inc., v. Flink*, 113 N. J. L. 582, 175 A. 62, 99 A. L. R. 1 (1934); *Huskie v. Griffin*, 75 N. H. 345, 74 A. 595, 27 L. R. A., N. S., 966, 139 Am. St. Rep. 718 (1909); *Temperon v. Russell*, 1 Q. B. 715, 62 L. J. Q. B. 412 (1893).

³RESTATEMENT, TORTS (1938) § 766, comment b.

directly in injury to one's means of earning a livelihood.⁴ This principle was more firmly established in later cases.⁵

Prima facie, the intentional infliction of temporal damage to the business of another will result in liability.⁶ However such an interference with the business of another is not actionable if it is privileged.⁷ Chief among these privileges is competition. Actual competition in a similar line of business has been held to be sufficient justification of the defendant's interference even though the competition is carried to the extreme of running the rival out of business.⁸ It is not actionable to cause loss of business to another, merely by engaging in a competing business, in the absence of bad faith, although it is known beforehand that the loss will most likely result.⁹ Good faith and the absence of predatory trade practices are the criteria. The law does not protect anyone against lawful competition, but the loss or injury resulting therefrom is *damnum absque injuria*.¹⁰ There is no liability for injury to the business of a competitor if such injury is caused only by keen competition, entered into with good faith.

For competition to serve as a justification for an interference with another's business or trade, such competition must be actual, fair and lawful, with the domi-

⁴In one of the earliest English cases, *Keeble v. Hickeringill*, 11 East 574, 11 Mod. Rep. 14, 130, 103 Eng. Rep. 1127 (1706), the defendant was held liable for intentionally frightening wild fowl which the plaintiff was attempting to capture for sale, the court saying that where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood an action will lie in all cases. *Accord*: *Gregory v. Duke of Brunswick*, 6 M. & G. 205 (1843); *Carrington v. Taylor*, 11 East 571 (1706).

⁵*White v. Riley* (1921), 1 Ch. 1, 12 B. R. C. 803; *Larkin v. Long* (1915) A. C. 814, Ann. Cas. 1915D, 509; *Quin v. Leatham* (1901) A. C. 495, 1 B. R. C. 197, 27 Eng. Rul. Cas. 66 (holding that the defendant must show a legal justification for his interference with the trade of another); *Temperton v. Russell*, 1 Q. B. 715, 62 L. J. Q. B. 412 (1893) (action will lie for interference with relations which are merely prospective or potential).

⁶In *Dade Enterprises v. Wometco Theatres*, 119 Fla. 70, 160 So. 209 (1935) it was held that an act which is calculated to and does in fact damage another in his property or trade is actionable if done intentionally without just cause or excuse; *Doremus v. Hennessey*, 176 Ill. 608, 52 N. E. 924, 54 N. E. 524, 43 L. R. A. 797, 802, 68 Am. St. Rep. 203 (1898); *Walker v. Cronin*, 107 Mass. 555 (1871); *Kamm v. Flink*, 113 N. J. L. 582, 175 A. 62, 99 A. L. R. 1 (1934).

⁷*Katz v. Kapper*, 7 Cal. App. 2d 1, 44 P. 2d 1060 (1935); *Carolina Aniline & Extract Co. v. Ray*, 221 N. C. 269, 20 S. E. 2d 59 (1942) (right to extend business into vicinity of another); *Cline v. Ins. Exch. of Houston*,—Tex.—, 154 S. W. 2d 491 (1941) (criterion is whether the defendant had a legal right to adopt his course of action).

⁸In the case of *Katz v. Kapper*, 7 Cal. App. 2d 1, 44 P. 2d 1060 (1933) the court held that the defendant's cutting prices below cost with the purpose of driving the plaintiff out of business was merely business competition and as such could serve as a justification for the injury caused.

In *Deon v. Kirby Lumber Co.*, 162 La. 671, 111 So. 55 (1927) the defendant forbade his employees to trade with a competitor. The court held that this was lawful competition and afforded no cause of action to the plaintiff although the defendant's action was directed to drive him out of business.

⁹*Beardsley v. Kilmer*, 236 N. Y. 80, 140 N. E. 203, 27 A. L. R. 1411 (1923) (Starting rival newspaper both for revenge and for self-protection and to establish a legitimate business is not actionable).

¹⁰*Carolina Motor Service v. Atlantic Coast Line Ry.*, 210 N. C. 36, 185 S. E. 479, 104 A. L. R. 1165 (1936); *Mogul Steamship Co. v. McGregor, Gow & Co.* 23 Q. B. D. 598, 58 L. J. Q. B. 465, *aff'd* (1892) A. C. 25, 61 L. J. Q. B. 295 (A defendant seeking to increase his own business may fix low rates and allow rebates).

nant purpose of benefitting the defendant rather than injuring the plaintiff.¹¹ If the competition is merely simulated competition designed for the purpose of injury to another, it cannot serve as a justification of the defendant's otherwise wrongful act.¹² Consequently it is actionable to enter into a certain line of business for the express and primary purpose of ruining a competitor and then retiring from the business.¹³ This rule inflicts liability not upon one who honestly attempts to start a competing business to further his own interests,¹⁴ but upon one who, desiring to inflict injury, attempts to use the privilege of competition to disguise his tortious conduct.¹⁵ Thus it has been held that the collateral existence of an intention to cause loss to a competitor will not render the defendant liable for his interference if his primary purpose in engaging in competition is to benefit himself.¹⁶ A number of courts have followed this line of reasoning in deciding cases similar to the principal one and have held that the defendant was not liable since his primary purpose in slashing prices was to acquire the business of the plaintiff's customers rather than to injure the plaintiff.¹⁷ Nevertheless, if his primary purpose in entering into competition with the plaintiff is to injure, the collateral desire to benefit himself will not serve as a legal justification.¹⁸ Cutting prices below cost may in the long run be an economic advan-

¹¹Where the competition is not in good faith, but is a mere device employed, not to advance the person acting, but to destroy the business of an adversary, it is not sufficient justification for the act. *Dunshee v. Standard Oil Co.*, 152 Iowa 618, 132 N. W. 371, 36 L. R. A., N. S., 263 (1911) (Defendant installed a scheme of retail distribution as a temporary expedient to drive out plaintiff); *Tuttle v. Buck*, 107 Minn. 145, 119 N. W. 946, 22 L. R. A., N. S., 599 (1909).

¹²In the case of *Boggs v. Duncan Schell Furn. Co.*, 163 Iowa 106, 143 N. W. 482, L. R. A. 1915B, 1196 (1913) the defendant, after losing the agency for a particular sewing machine, obtained some second-hand machines of this make and offered them for sale as new, at reduced prices, with the purpose of injuring his competitor who had secured the agency for these machines. The court held that this was not a case of lawful competition, but one of simulated or pretended competition, designed and carried out with the purpose of injury to the competitor and as such unlawful.

¹³In *Tuttle v. Buck*, 107 Minn. 145, 119 N. W. 946, 22 L. R. A., N. S., 599 (1909) the defendant had opened a barber shop in competition with that of the plaintiff for the express and primary purpose of running the plaintiff out of business. The court held that this was a wanton wrong and a perversion of terms to call it competition.

¹⁴*Beardsley v. Kilmer*, 236 N. Y. 80, 140 N. E. 203, 27 A. L. R. 1411 (1923); *accord*, *Roggensack v. Winona Monument Co.*, 211 Iowa 1307, 223 N. W. 493 (1930) (right to extend business into another's vicinity by fair methods no matter what the effect on the other).

¹⁵In *Kamm v. Flink*, 113 N. J. L. 582, 175 A. 62, 99 A. L. R. 1 (1934) it was said: "Unjustified interference with one's right to pursue his lawful business and reap the earnings of his industry is forbidden. Under guise of free competition no man may by unlawful means prevent another from obtaining the fruits of his labor. *Accord*: *Walker v. Cronin*, 107 Mass. 555 (right to be free from malicious and wanton interference under the guise of competition).

¹⁶*Katz v. Kapper*, 7 Cal. App. 2d 1, 44 P. 2d 1060 (1935); *Beardsley v. Kilmer*, 236 N. Y. 80, 140 N. E. 203, 27 A. L. R. 1411 (1923); *W. Va. Transp. Co. v. Standard Oil Co.*, 50 W. Va. 611, 40 S. E. 591, 88 Am. St. Rep. 895, 56 L. R. A. 804 (1902).

¹⁷*Mogul S. S. Co. v. McGregor, Gow & Co.*, 23 Q. B. D. 598, 58 L. J. Q. B. 465 (1889), *aff'd* (1892) A. C. 25, 61 L. J. Q. B. 295 (holding that a war of competition may be pursued to the bitter end if it is waged in the interests of one's own trade).

In the case of *Gilly v. Hirsh*, 122 La. 966, 48 So. 422, 20 L. R. A., N. S., 972 (1909), it was said: "Where a merchant undersells or oversells his neighbor, although the latter may suffer damages thereby, it is *damnum absque injuria*."

¹⁸*Tuttle v. Buck*, 107 Minn. 145, 119 N. W. 946, 22 L. R. A., N. S., 599 (1909); *see* *Cleaning & Dyeing P. O. Ass'n v. Sterling Cleaners*, 22 N. E. 2d 149 (1936). (If the primary purpose of a price cut is to destroy a competing business it is unfair competition).

tage to the defendant, but where the cut is done in a predatory fashion with the dominant purpose of injuring the plaintiff it may be actionable. In the principal case the defendant slashed prices under the guise of competing with the plaintiff, but his primary purpose was one of injuring the plaintiff and running him out of business. He was pretending to compete with the plaintiff, when in truth he was cutting prices for the primary purpose of injuring the plaintiff rather than benefitting himself. The privilege of competition when thus abused could no longer protect him from the consequences of his interference with the business of the plaintiff.

Likewise it has been held that competition is no justification for an interference with the business of another if the interference is prompted solely by malice.¹⁹ In reaching this decision many courts have attempted to draw a distinction between the exercise of absolute rights, such as those incident to ownership of property, and the exercise of qualified or common rights, such as the right to engage in business in competition with others. In reaching the conclusion that an absolute right may be exercised without reference to motive, these courts have applied the general principle that an otherwise lawful act does not become unlawful because of the motive of the actor.²⁰ Some courts have extended this principle to cover the exercise of qualified rights, holding that an injury to the business of a competitor is not actionable although the defendant was actuated primarily by malice and a desire to injure his competitor.²¹ These courts have held that a malicious motive may make a bad case worse, but it cannot make that wrong which is in its essence lawful.²² However, there is ample authority for the statement that when injury results from the exercise of a common or qualified right such as competition, the motive of the person exercising the right is a proper subject of inquiry for the courts.²³ If it is found that this common right

¹⁹*Doremus v. Hennessy*, 176 Ill. 608, 43 L. R. A. 797 (1898) (there must be actual malice); *Boggs v. Duncan Schell Furn. Co.*, 163 Iowa, 106, 143 N. W. 482, L. R. A. 1915B, 1196 (1913); *Benton Wesley v. Native Lumber Co.*, 97 Miss. 814, 52 So. 346, Ann. Cas. 1912D, 796 (1910) (holding that it was illegal for the defendant to maliciously forbid his employees to trade with the plaintiff); *Globe & Rutgers Fire Ins. Co. v. Fireman's Fund Ins. Co.* 97 Miss. 148, 52 So. 454, 29 L. R. A., N. S., 869 (1910) (inducing employee to leave the plaintiff's service for the sole purpose of injuring the plaintiff).

²⁰*Auburn & C. Pl. Road Co. v. Douglass*, 9 N. Y. 44; *Phelps v. Nowlen*, 72 N. Y. 39, 28 Am. St. Rep. 93; *Kiff v. Youmans*, 86 N. Y. 324, 40 Am. St. Rep. 543. *Allen v. Flood*, (1898) A. C. 1, 17 Rul. Cas. 285 (holding that an act lawful in itself is not converted by a malicious or bad motive into an unlawful act, so as to make the doer of the act liable to a civil action).

²¹In the case of *Passaic Print Works v. Ely & W. Dry Goods Co.*, 44 C. C. A. 426, 105 F. 163, 62 L. R. A. 673, cert. denied, 181 U. S. 617, 45 L. ed. 1929, 21 S. Ct. 922 (1901) the defendant, a merchant, had sent some circulars to the retail trade offering small quantities of the plaintiff's product at a cut price for the purpose of injuring the plaintiff's trade and depressing the price of his goods. The court held that the defendant was only exercising an undoubted, legal right and that his motive was immaterial.

²²*Chambers v. Baldwin*, 91 Ky. 121, 15 S. W. 57, 11 L. R. A. 545, 34 Am. St. Rep. 168 (1891).

²³Two interesting cases on this subject illustrate the influence which the primary purpose of the defendant may have upon the determination of his liability. In *Wesley v. Native Lumber Co.*, 97 Miss. 814, 52 So. 346, Ann. Cas. 1912D, 796 (1910), it was held that an employer was liable for forbidding his employees to trade with the plaintiff, since the defendant was actuated only by motives of malice and ill-will. In the other case, *Deon v. Kirby Lumber Co.*, 162 La. 670, 111 So. 55 (1927), the situation was almost the same, except that the defendant was in competition with the plaintiff. The court held that, since the defendant and plaintiff were in competing businesses, this was lawful competition and therefore not actionable.

has been exercised for the primary purpose of loss or injury to another the wrong resulting therefrom is actionable.²⁴ Loss as the result of the exercise of the qualified right of competition is not actionable, unless the dominant purpose to inflict injury is established; but if it is established that the interference was for a mere wanton or malicious purpose, the qualified right of free competition disappears as a justification and the interference becomes actionable. In the case at hand the court, in holding that although the reduction of prices was an absolute right of the defendant, nevertheless his malice made it unfair competition, extended the idea of unfair competition beyond that generally recognized. If this doctrine is carried to its logical conclusion, it would result in subjecting any defendant who acted through malice to liability in all cases where injury resulted, no matter how absolute his right to adopt his particular course of action might be. It would be more in line with the reasoning of the other cases on this subject to hold that the reduction of prices, that is, engaging in competition with others, is a qualified right, and, if exercised with the primary purpose of injuring one's competitor, actionable.

Martha W. Gerald.

²⁴In *Kamm v. Flink*, 113 N. J. L. 582, 175 A. 62, 99 A. L. R. 1 (1934), it was held that the commission of a wrongful act with the intent to injure a rival's business is malicious although the act would probably result in self-enrichment.

TORTS—LANDLORD AND TENANT—LIABILITY OF LANDLORD FOR DEFECTIVE
STEPS IN RENTED HOUSE—EFFECT OF GRATUITOUS COVENANT TO REPAIR

Defendant owned a one-story, two-apartment tenement house. He leased one of the apartments to plaintiff, under a rental contract by which plaintiff was to pay a fixed sum monthly, with no obligation on the part of the landlord to keep the place in repair. There was a front porch with steps common to both tenants. In October, 1938, the steps needed repairing, and the landlord agreed to repair, but failed to do so. Shortly afterwards one of the steps broke through with the tenant, resulting in injury to her: *Held*: There is no duty on the landlord in a simple lease contract to keep premises in repair, and where there was no consideration for the landlord's promise to repair, there can be no recovery in tort. On suggestion of error, the Court's attention was drawn to the fact that the apartment was occupied by two tenants, both of whom used the steps. It withdrew its former opinion on the case and sustained the judgment of the circuit court for the plaintiff. *Held*: There is a duty on the landlord to keep premises used in common by tenants in a reasonably safe condition, inasmuch as the landlord necessarily retains control over such premises. *Hiller v. Wiley*,—Miss.—, 5 So. (2d) 489, sugg. err. sust., 6 So. (2d) 317 (1942).

When a landlord leases his premises to a tenant, there is no implied duty on the landlord to keep the premises in repair.¹ It follows therefore that a landlord is not liable to his tenant for personal injuries resulting from defective and unsafe premises.² The majority of the courts in the United States have upheld this view.³ To this general rule there have been developed certain exceptions, as follows:

(1) A landlord will be liable to his tenant for concealed dangerous conditions, when the landlord knows of them at the time of the lease and fails to warn the tenant.⁴

(2) When the landlord retains control of a part of the premises used by the tenant, there is a duty on the landlord to use due care to keep these premises safe;

¹*Morgan v. Sheppard*, 156 Ala. 403, 47 So. 147 (1908); *Newman v. Golden*, 108 Conn. 676, 144 Atl. 467 (1929); *Phelan v. Fitzpatrick*, 188 Mass. 298, 74 N. E. 326, 108 Am. St. Rep. 469 (1905); *Ward v. Fagin*, 101 Mo. 669, 14 S. W. 738, 10 L. R. A. 147 (1890). "The court does not imply any covenants in a lease. If the landlord does not expressly undertake to make and keep the premises safe he is not charged with that duty." See Notes (1896-97) 34 L. R. A. 824, 825.

²*Wilson v. Threadwill*, 81 Cal. 58, 22 Pac. 304 (1889); *Libbey v. Tolford*, 48 Me. 316, 77 Am. Dec. 229 (1861); *Ward v. Fagin*, 101 Mo. 669, 14 S. W. 738 (1890); see: *Clancy v. Byrne*, 56 N. Y. 129, 15 Am. Rep. 391 (1874).

³32 Am. Jur. 512, 515; see: *Rich v. Swalm*, 161 Miss. 505, 516, 137 So. 325, 326 (1931).

⁴*Cowen v. Sunderland*, 145 Mass. 363, 14 N. E. 117, 1 Am. St. Rep. 469 (1887); *Cesar v. Karutz*, 60 N. Y. 229, 19 Am. Rep. 164 (1875); see: *Miner v. McNamara*, 81 Conn. 690, 72 Atl. 138 (1909). "A decided exception to the general rule that the doctrine of caveat emptor applies in the case of a demise of premises exists where the lessor knows that the premises are infected with contagious disease germs which render them dangerous, and the tenant is ignorant of their condition." *Hamilton v. Feary*, 8 Ind. App. 615, 35 N. E. 48, 52 Am. St. Rep. 485 (1893).

and for an injury resulting from a breach of this duty, the landlord will be held liable.⁵

(3) If the landlord actually undertakes to make repairs, and he does so in a negligent manner, he is liable to his tenant for personal injuries resulting from the defective repairs made.⁶

(4) A minority of the courts have held that if the landlord contracts to repair, and negligently fails to do so, he is liable to his tenant not only for breach of contract, but also for damages resulting from personal injuries.⁷

Little difficulty has been experienced in the application of the first three ex-

⁵*Sawyer v. McGillicuddy*, 81 Me. 318, 17 Atl. 124 (1889); *Grella v. Lewis Wharf Co.*, 211 Mass. 54, 97 N. E. 745 (1912); *Roman v. King*, 289 Mo. 641, 233 S. W. 161 (1921); *United Shoe Machinery Corporation v. Paine*, 26 F. (2d) 594, 58 A. L. R. 1398, 1411 (1928); *Buda v. Dzuretzko*, 7 N. J. L. 34, 93 Atl. 83 (1915); *Dollard v. Roberts*, 130 N. Y. 269, 29 N. E. 104, 14 L. R. A. 238 (1891).

"The obligation to repair, in the absence of any express agreement, depends upon the right of possession—and that an appurtenance attached to and made for the accommodation of several different tenements, leased to different tenants, remains in the possession of the lessor, though the use of it goes to the lessees." *Sawyer v. McGillicuddy*, 18 Me. 318, 17 A. + L. 125 (1889).

⁶*Glickauf v. Maurer*, 75 Ill. 289, 20 Am. Rep. 238 (1874); *Green v. Long*, 152 Miss. 117, 118 So. 705 (1928); *Kirshenbaum v. General Outdoor Adv. Co.*, 258 N. Y. 489, 259 N. Y. 525, 180 N. E. 245, 182 N. E. 165, 84 A. L. R. 645 (1932); see: *Hamilton v. Feary*, 8 Ind. App. 615, 35 N. E. 48, 52 Am. St. Rep. 485 (1894).

⁷*Hart v. Coleman*, 201 Ala. 345, 78 So. 201 (1917); *Barron v. Liedloff*, 95 Minn. 474, 104 N. W. 289 (1905); *Mesher v. Osborne*, 75 Wash. 439, 134 Pac. 1092, 48 L. R. A. (N. S.) 917 (1913); *Flood v. Pabst Brewing Co.*, 158 Wis. 626, 149 N. W. 489 (1914) see: *Keegan v. Heilman Brewing Co.*, 129 Minn. 496, 152 N. W. 877 (1915); *Perez v. Rabaud*, 76 Tex. 191, 13 S. W. 177 (1890).

Contra: *Grazer v. Flanagan*, 35 Cal. App. 724, 170 Pac. 1076 (1918); *Hanson v. Cruse*, 155 Ind. 176, 57 N. E. 904 (1900); *Thompson v. Clemens*, 96 Md. 196, 53 Atl. 919 (190); *Tuttle v. Gilbert Mfg. Co.*, 145 Mass. 169, 13 N. E. 465 (1877); *Dustin v. Curtis*, 74 N. H. 266, 67 Atl. 220, 13 Ann. Cas. 169, 11 L. R. A. (N. S.) 504 (1907); *Silverman v. Isaac*, 183 App. Div. 542, 170 N. Y. Supp. 290 (1918).

In *Dustin v. Curtis*, 74 N. H. 266, 67 Atl. 220 (1907), the court set out that an action in tort for damages resulting from breach of landlord's agreement to repair could not be maintained, "unless her failure resulted in the breach of a duty imposed by law, as well as the breach of an obligation created by the agreement of the parties."

Holding landlord liable, the Alabama Court, in *Hart v. Coleman*, 201 Ala. 345, 78 So. 201 (1917), said, "It may be conceded that the weight of authority from a numerical standpoint exempts the landlord from liability. . . . Numerous cases deny recovery either in an action ex contractu upon the ground that such damages for personal injuries were not in the contemplation of the parties, and were too remote, and further holding that to permit a recovery for such damages, based on a contract simply because it is in form an action of tort, will be making a distinction that could not be justified by reason or authority, and thus denying a recovery in any form of action. Of these cases the Supreme Court of Tennessee in *Merchants' Cot. Comp. Co. v. Miller*, 135 Tenn. 187, 186 S. W. 87 (1916), said: 'More may be said of the logical exactness of this doctrine than of its inherent justice.'"

The court in *Keegan v. Heilman Brewing Co.*, 129 Minn. 496, 152 N. W. 877, said that: "The action is for the wrong committed by the landlord by his negligence in failing to perform an act assumed by him, which he should know would protect them from injury if performed, or expose them to injury if not performed. The contract creates an implied legal duty on the part of the landlord toward those who are rightfully upon the premises, and a negligent violation thereof vests in them a right of action in tort against him for injuries sustained."

ceptions.⁸ It is the fourth one that has brought about conflict of authority, and today is the subject of much debate.⁹ In the course of conflicting decisions on this subject, the majority of the courts, holding the landlord not liable for personal injuries, but liable only for breach of contract, have done so on the ground that the contract does not create any additional legal duties or rights as between the landlord and tenant, other than the contractual obligation.¹⁰ Other decisions have declared that damages for personal injuries are too remote to be included in an action for breach of contract to repair; that such an injury is not a natural or probable consequence which ordinarily and reasonably could be anticipated from a breach of contract to repair.¹¹

Those courts which have allowed recovery for personal injuries have usually done so on the theory that the landlord by the contract retains the right to enter the premises, and thereby a duty is imposed on him as an occupier to keep the premises reasonably safe.¹² Some courts have held the landlord liable on the ground that by agreeing to repair and failing, he misled the tenant and prevented him from making repairs.¹³ "On whatever theory, it is clear that the cases represent a more or less ill-defined feeling that the responsibility which has been retained voluntarily is not to be shifted to the lessee. The minority view has been slowly gaining ground, and has received the approval of the Restatement of Torts."¹⁴

The Mississippi Supreme Court has considered few cases on the general subject. But in the cases it has decided the Court has indicated fairly definitely that it follows the majority of courts as to the general rule that the landlord is not liable to his

⁸The first two exceptions seem to have been developed and recognized at common law, *see*: PROSSER, TORTS (Hornbook Series) 650 and 656. The majority of the courts in the United States agree as to the third listed exception, *see*: PROSSER, TORTS, *id.* 661.

⁹"The effect of an agreement on the part of the lessor to keep the premises in repair is a subject of considerable dispute." *See*: PROSSER, TORTS, *id.* 658.

¹⁰"It may be stated, as a general rule, that for a breach of contract in any case the injured party is entitled to recover such damages, only, as proximately resulted from the breach, and were within the contemplation of the parties when the contract was entered into. Damages which are remote and speculative cannot be recovered. In this respect the rule is not different from what it would be if the contract to repair had been between the tenant and a mechanic or workman employed by her to do the work. The only damages recoverable in such case would be the difference between the price agreed upon, and the actual cost of the work if the employer had hired another to do it, and possibly such other damages as were sustained by reason of the delay." *Hamilton v. Feary*, 8 Ind. App. 615, 35 N. E. 48, 52 Am. St. Rep. 485 (1894).

¹¹"Where the only relation between the parties is contractual, the liability of one to the other in an action of tort for negligence must be based upon some positive duty which the law imposes because of the relationship, or because of the negligent manner in which some act which the contract provides for is done; . . . the mere violation of a contract, where there is no general duty, is not the basis of such an action." *Dustin v. Curtis*, 74 N. H. 266, 67 Atl. 220, 13 Ann. Ca. 169, 11 L. R. A. (N. S.) 504 (1907).

¹²*Barron v. Leidloff*, 95 Minn. 474, 104 N. W. 289 (1905); *Flood v. Pabst Brewing Co.*, 158 Wis. 626, 149 N. W. 489 (1914).

¹³The "lessor has seen fit to interpose his own agreement to repair, and thereby tended, at least, to cause the lessee to hold back and wait for its execution on his part. He has elected to retain for his own, as primarily resting on him, the duty of care in the particular regard, and should not complain if the law leaves the burden where he placed it and holds him not exempt." *Merchants' Cot. Comp. Co. v. Miller*, 135 Tenn. 187, 186 S. W. 87 (1916).

¹⁴PROSSER, TORTS (Hornbook Series) 661.

tenant for personal injuries resulting from defective premises.¹⁵ The Court has also indicated that it follows the usual ruling as to the first three exceptions to the general rule—that is, (1) that the landlord will be held liable when there are concealed dangerous conditions,¹⁶ (2) when he retains control of a part of the premises,¹⁷ and (3) when he actually repairs in a negligent manner.¹⁸

In considering the question involved in the fourth exception whether there can be recovery when a contract to repair is breached, the Mississippi Supreme Court has experienced much the same confusion that other states have. In *Rich v. Swalm*¹⁹ the court set out the majority rule that there could be no recovery for personal injuries resulting from breach of contract to repair.²⁰ This was the early rule in Mississippi, and was in accord with the other cases indicating that Mississippi would accept the majority rule.

*Hodges v. Hilton*²¹ was an indication that Mississippi was abandoning the majority rule as to the fourth exception, and swinging over to the minority viewpoint. The court seemed to consider it too harsh to continue to assert dogmatically that a tenant could have no relief against his landlord,²² and it allowed recovery, based on a covenant supported by consideration²³ to make specific repairs.²⁴ The *Hodges* case did not attempt to overrule the *Rich* case and announce the minority rule alto-

¹⁵"The general rule is firmly established that no implied covenant for repairs can be raised against the lessor." *Jones v. Millsaps*, 71 Miss. 10, 14 So. 440 (1893). "In the absence of a statute, the rule of law is universal that a simple lease for a dwelling or other private premises carries no obligation whatever upon the landlord to repair, if there be no deceit or misrepresentation, or the equivalent thereof, by the landlord." *Rich v. Swalm*, 161 Miss. 505, 137 So. 325 (1931). "A tenant takes premises as he finds them, and in absence of concealment or fraud as to some defect or danger, known to landlord and unknown to tenant, rule of caveat emptor applies." *McDonald v. Wilmut Gas & Oil Co.*, 180 Miss. 350, 176 So. 395 (1937).

¹⁶*Rich v. Swalm*, 161 Miss. 505, 137 So. 325 (1931) (by implication).

¹⁷"Where . . . there was a common approach and a single set of front steps available for use by all tenants and by landlord, landlord retained control over the steps and was responsible for reasonable upkeep thereof . . . and hence where landlord and her agent were negligent in that respect, they were liable to tenant for injuries sustained on steps." *Hiller v. Wiley*, 6 So. (2d) 317 (1942).

¹⁸*Green v. Long*, 152 Miss. 117, 118 So. 705 (1928).

¹⁹161 Miss. 505, 137 So. 325 (1931).

²⁰"Such an injury is not a natural or probable consequence which ordinarily and reasonably could be anticipated from a breach of covenant to generally repair; that, in order to recover such damages, there must be shown some act of negligence or misfeasance, beyond the mere breach of the covenant to repair." *Rich v. Swalm*, *id.* at 518, 137 So. at 327.

²¹173 Miss. 343, 161 So. 686 (1935).

²²"The supports under this porch were decayed and rotten. When this condition was called to the attention of the appellant, she was bound to anticipate that personal injuries would naturally and probably result from the use of the porch in that condition. The contract to repair . . . was for the benefit of the tenant. . . ." *Hodges v. Hilton*, 173 Miss. 343, 161 So. 686 (1935).

²³"The duty assumed by the appellant in respect to this porch had its foundation in, and arose out of, the contract to repair. . . . The contract to make these specific repairs gave the lessor control over the premises for that purpose, and her negligent failure to discharge the duty so assumed gave rise to an action in tort for damages caused." *Hodges v. Hilton*, 173 Miss. 343, 161 So. 686 (1935).

²⁴"The decision in that case (*Rich v. Swalm*) is carefully limited to an action on a covenant to repair generally, as distinguished from specific repairs undertaken to be made, and is therefore not controlling in the case now before us." *Hodges v. Hilton*, 173 Miss. 343, 161 So. 686 (1935).

gether, but indicated a trend towards it, and left the court in the middle of the road. This exact position does not appear to have been adopted by other courts.

Has the principal case reversed the trend toward the minority view, and returned to the majority rule? In its first consideration of this case, the Court, while stating specifically that it did not overrule *Hodges v. Hilton*, held that a tenant could not recover for personal injuries when there had been a covenant to repair without consideration.²⁵

In spite of its specific statement to the contrary, the Court may perhaps have modified the case of *Hodges v. Hilton*, and indicated that it is not yet ready to adopt completely the minority rule. The Court drew the line of distinction between covenants without consideration and covenants with consideration,²⁶ yet the reasons given in support of the minority rule can apply equally as well when there is a covenant without consideration as when there is a covenant supported by consideration. Thus one who makes a covenant without consideration has reserved the privilege to come onto the land and may be said to be in control of the premises for purposes of repair as well as one who makes a covenant with consideration. Also, as for the theory that the tenant has been misled by landlord's covenant with consideration to repair, can it not be that a landlord's gratuitous promise would mislead as well?²⁷

On the other hand, some courts have held that there can be no recovery in case of a gratuitous covenant.²⁸ It is impossible, therefore, to predict at the present time what effect the principal case will have upon the rule in Mississippi. It would seem, however, that the Mississippi Supreme Court, with the minority rule of *Hodges v. Hilton* still the law, will in the future adopt this more liberal view when the interests of justice can thereby best be served.

Erich Wm. Merrill.

²⁵The Court held: "The ground of nonliability, of course, is the want of consideration for the promise to repair," and said that this case was similar to the case that would arise if a neighbor had promised to send a carpenter over to fix the premises without any charge." *Hiller v. Wiley*,—Miss.—5 So. 2d 489 (1942).

²⁶See, *supra* note 25.

²⁷Since, when recovery is allowed, the action is usually held to be in tort, it is difficult to see how it would make any difference whether there was or was not any consideration for the promise.

The landlord, as such, has certain duties imposed on him by law, whether he covenants or not. Since he is in a better position than his tenant to know what repairs are needed, and in a better position financially to make them, why should not the law impose upon him a duty toward his tenant to repair upon any express representation that he will make such repairs, the negligent failure to do so rendering him liable to his tenant for damages from injuries caused by his negligence.

²⁸PROSSER, TORTS (Hornbook Series) 658.

CRIMINAL LAW—POWER OF COURT TO INCREASE SENTENCE WHEN
PUNISHMENT HAS ALREADY BEEN PARTLY SUFFERED UNDER
ORIGINAL SENTENCE—WHAT CONSTITUTES SUFFERANCE

Defendant was indicted for conspiracy to violate the alcohol tax laws. Upon a plea of guilty a fine of \$1,500 was levied and defendant given 30 days in which to pay the fine; this sentence was rendered on June 24, 1941. On July 15 the defendant appeared before the court seeking a reduction of the fine, saying that it was impossible for him to raise that amount. Thereupon the court imposed a sentence of 2½ years with no option of fine. Defendant was then taken into custody, but three days later defendant's attorney tendered \$1,500 to the clerk of the court in payment of fine. This was refused. Subsequently the court denied a petition praying that the clerk be required to accept the fine and release the defendant: *Held*: Since punishment has already been partly suffered under the original sentence, it is not within the power of the court to increase sentence. *Frankel v. United States*, 131 F. (2d) 756 (C. C. A. 6th, 1942).

It is a fundamental principle of law that a trial court is without authority to set aside the original sentence and impose another increasing the punishment, if the defendant has partly executed the original sentence.¹ This is true even though the subsequent sentence is imposed at the same term during which the original sentence was rendered.² Moreover, it is well established that a sentence partly served by the defendant cannot be replaced by a subsequent sentence which increases the penalty after the end of the term of court at which the sentence was imposed.³

To permit the court to set aside the original sentence and to impose a subsequent one increasing the punishment, after the defendant has begun to suffer under the original sentence, would be equivalent to putting the defendant in jeopardy twice for the same offense.⁴ The original judgment of the court, in the absence of technical errors, is operative, and the subsequent sentence increasing that originally rendered invades the Constitutional provision prohibiting double jeopardy.⁵ It has also been said that the subsequent sentence interferes with the executive power of pardon.⁶

¹*United States v. Benz*, 282 U. S. 304, 75 L. ed. 354, 51 S. Ct. 113 (1931); *Emerson v. Boyle*, 170 Ark. 621, 280 S. W. 1005, 44 A. L. R. 1193 (1926); *Williams v. State*, 125 Ark. 287, 188 S. W. 826, L. R. A. 1917B, 586 (1916); *Tanner v. Wiggins*, 54 Fla. 203, 45 So. 459, 14 Ann. Cas. 718 (1907); *Elsner v. Shrigley*, 80 Iowa 30, 45 N. W. 393 (1890); *State v. Woods*, 154 La. 631, 98 So. 47 (1923); *Brown v. Rice*, 57 Me. 55, 2 Am. Rep. 11 (1869); *Hickman v. Fenton*, 120 Neb. 66, 231 N. W. 510, 70 A. L. R. 819 (1930); *State v. Crook*, 115 N. C. 760, 20 S. E. 513, 29 L. R. A. 260 (1894).

²*Parker v. State*, 51 Miss. 535 (1875); *People v. Kelley*, 79 Mich. 320, 44 N. W. 615 (1890); *State v. White*,—N. J. L.—, 130 Atl. 470 (1935); *State v. Cannon*, 11 Ore. 312, 2 Pac. 191 (1884).

³*Ex parte Friday*, 43 Fed. 916, 8 Am. Crim. Rep. 351 (1890); *Saleen v. People*, 41 Colo. 317, 92 Pac. 731 (1907); *In re Beck*, 63 Kan. 57, 64 Pac. 971 (1901); See *McCarthy v. State*, 56 Miss. 295 (1879).

⁴*United States v. Benz*, 282 U. S. 304, 75 L. ed. 354, 51 Sup. Ct. 113 (1931); *Ex parte Lange*, 18 Wall (U. S.) 163, 21 L. ed. 872 (1874); *Rupert v. State*, 9 Okl. Crim. Rep. 226, 131 Pac. 713, 45 L. R. A. (N. S.) 60 (1913).

⁵U. S. Const., Amend. V; MISS. CONST. (1890) § 22; see *Ethridge*, Mississippi Constitutions (1928) 110-114.

⁶*Brabandt v. Commonwealth*, 157 Ky. 130, 162 S. W. 786 (1914); see (1939) 30 J. Crim. L. 140.

Although it has been held that a court, during the same term the sentence was imposed, does not have the power to mitigate punishment after execution of sentence,⁷ the Supreme Court of the United States has held that such a power did exist.⁸ The Court in *United States v. Benz* said that a mitigation of the original sentence did not violate the executive pardoning power since reducing sentence by amendment alters the terms of judgment itself and is a judicial act as much as the imposition in the first sentence.⁹

What constitutes suffering under a sentence sufficient to deprive the court of the power of increasing it? This question has been presented to a few tribunals, and each case has introduced a unique as well as difficult problem for the court. In *State v. Meyer*,¹⁰ defendant had been imprisoned twelve hours under a sentence. On the same day the court recalled the defendant and imposed another sentence increasing the punishment. On appeal the court held that the twelve-hour imprisonment was a sufficient sufferance of the original sentence, and thus the subsequent sentence was void. In *People v. Meservey*, defendant, convicted of burglary, was sentenced to prison for five years. On the next day, the prisoner attempted to escape from the prison in which he was confined. Because of this attempted break, the defendant was brought back into court and resented to a term of ten years. It was held that the one-day imprisonment was sufficient to constitute an execution of the original sentence; the subsequent sentence was therefore void.

In a Mississippi case¹² defendant was convicted of a felony and sentenced to be imprisoned in the state penitentiary for the period of one year from April 13, 1877. A transcript of the record of the defendant's trial and conviction was sent to the Supreme Court, unaccompanied by any writ of error or appeal, or any bond. Because of the failure to send the written petition to the Supreme Court, the court struck the case from the docket on the 15th of January, 1878. Thereupon the defendant was arrested by the sheriff and incarcerated in jail; nine months had passed and the defendant had been at large during this time. The defendant remained in jail until the twelve months expired and then sued out a writ of habeas corpus maintaining that his term of confinement had terminated. But the court held that the date fixed for the punishment to begin was directory and formed no part of the sentence itself. Hence the defendant could be brought before the court and a new period of confinement prescribed. If the sentence is not carried into effect at the

⁷*Auldrige v. Wombe*; 157 Ga. 64, 120 S. E. 620 (1923); *State v. Ensign*, 38 Idaho 539, 223 Pac. 230 (1924); *State ex. rel. Reid v. District Ct.*, 68 Mont. 309, 218 Pac. 558 (1923).

⁸*United States v. Benz*, 282 U. S. 304, 75 L. ed. 354, 51 Sup. Ct. 113 (1931); *State v. O'Connor*, 154 Minn. 45, 191 N. W. 50 (1922); *State v. Rooney*, 12 N. D. 144, 95 N. W. 513 (1903).

⁹*United States v. Benz*, 282 U. S. 304, 75 L. ed. 354, 51 Sup. Ct. 113 (1931). The Court upholding a subsequent sentence mitigating punishment said, "We find nothing in the suggestion that the action of the district court in reducing the punishment after the prisoner had served a part of the imprisonment originally imposed was a usurpation of the pardoning power of the executive."

¹⁰86 Kan. 793, 122 Pac. 101, 40 L. R. A. (N. S.) 90, Ann. Cas. 1913C, 278 (1912) (recognizing power of court to mitigate punishment).

¹¹76 Mich. 223, 42 N. W. 1133 (1889).

¹²56 Miss. 282 (1879).

period named, it is a general rule that the party may be brought again before the court upon motion, and a new period prescribed.¹³

What constituted a sufferance of the original sentence in the principal case? The court seemed to think that the indication of the proposed fine coupled with the attempt of the defendant to raise money was adequate. Moreover, since the money was tendered to the clerk before the thirty days had expired, respect and confidence in the judicial process would demand that the entire thirty-day period be kept open for acceptance; it was a definitely granted period of grace. Furthermore, the court was without power to impose the subsequent sentence during the thirty-day period,¹⁴ although it had the power to set aside the fine had not a sufferance under the original sentence been found.

The principal case follows the majority rule avoiding subsequent sentences increasing the punishment, when execution of the original sentence has begun. But it found that a sufferance of a sentence could be had without a confinement: the mere attempt of the defendant to raise money was considered a detriment. Although this decision follows the current trend,¹⁵ an examination of the cases in point reveals that the attitude of the court in the instance decision was extremely liberal in finding a sufferance under the original sentence.

Phil O. Brock.

¹³*Ex parte Collins*, 8 Cal. App. 367, 97 Pac. 188 (1908); *Terrell v. Wiggins*, 55 Fla. 596, 46 So. 727, 127 Am. St. Rep. 196 (1908); *Neal v. State*, 104 Ga. 509, 30 S. E. 858, 42 L. R. A. 190, 69 Am. St. Rep. 175 (1898); *Ex parte Eldridge*, 3 Okla. Crim. Rep. 499, 106 Pac. 980, 27 L. R. A. (N. S.) 625, 139 Am. St. Rep. 967 (1908).

¹⁴*Frankel v. United States*, 131 F. (2d) 756, 759: "Assuming that the court had power to set aside the fine, or that the indicated fine was not a formal sentence, the court was still without power to impose a prison sentence until the interval set by it for payment had expired."

¹⁵See, *supra* note 1.

TORTS—NEGLIGENCE—PROXIMATE CAUSE—UNRELATED CAUSES
CONJOINING TO PRODUCE INJURY

Defendant owned and operated a roller skating rink; every Saturday morning was children's day. Plaintiff, a nine-year-old boy of good health, came to the rink one Saturday morning, paid his admission, put on the skates provided by defendant for him, and ventured out upon the floor. Though he had seen others skating frequently, plaintiff had never himself skated; but defendant did not know of this fact. In his futile attempts to skate he fell in close succession some forty to fifty times. Plaintiff then began to cry and one of defendant's agents came to his rescue. He was taken home and later an operation was necessary upon his hip. He was permanently crippled. Jury found for plaintiff. *Held*: Reversed and judgment rendered for defendant. Plaintiff assumed the risks of the amusement, and defendant owed him no duty until such time as he knew, or should have known, that plaintiff could not skate. Since it was not shown which fall, or falls, caused the injury, the court cannot resort to surmise in holding the defendant liable. *Blizzard v. Fitzsimmons*, . . . Miss . . . , 10 So. (2d) 343 (1942).

The increased need of a modern world for more entertainment threatens to bring into existence a new major field of civil litigation, torts by amusement companies and their employees.¹ The present case is interesting for two principal reasons: (1) it appears to be the only reported case of its immediate character in this country; and (2) appellate courts seldom completely overrule a jury decision in cases of negligence.²

One who participates in the diversion afforded by an amusement device accepts the dangers that inhere in it so far as they are obvious and necessary.³ The operator of a roller skating rink is not the "insurer" of his patrons from risks other than those normally incident to the sport.⁴ A proprietor of a place of public amusement is bound to guard against dangers that can reasonably be anticipated and averted by ordinary care.⁵

Under the "assumption of risk" doctrine which was so popular at the turn of the century and is still in force in Mississippi, except as changed by statute,⁶ the defendant would not be liable for the injuries to plaintiff until that time when a reasonable degree of watchfulness would have disclosed the inability of the boy to skate. Defendant was originally justified in presuming that a healthy boy nine years of age knew how to skate when he bought an admission ticket. Therefore there must have been two series of falls: before defendant should have known that plaintiff could not skate, and the series occurring after that theoretical time.

¹See NOTE (1936) 10 So. CAL. L. REV. 67.

²PROSSER, TORTS (1941) 374; *Owens v. Y. & M. V. Ry.*, 94 Miss. 378, 47 So. 518 (1908).

³*Young v. Ross*, 127 N. J. L. 211, 21 A. (2d) 762 (1942); *Curcio v. City of New York*, 275 N. Y. 20, 23, 9 N. E. (2d) 760 (1937); *Lumsden v. Thompson Scenic Ry. Co.*, 130 App. Div. 209, 114 N. Y. Supp. 421 (1909).

⁴*Thomas v. Studio Amusements*, 50 Cal. App. (2d) 538, 123 P. (2d) 552 (1942).

⁵*Meridian Amusement Concession Co. v. Robinson*, 188 Miss. 136, 193 So. 335 (1939) (where boy was drowned in public swimming pool); *Potts v. Crafts*, 5 Cal. App. (2d) 80, 42 P. (2d) 87 (1935).

⁶MISS. CODE ANN. (1930) § 513; *McDonald v. Wilmut Gas & Oil Co.*, 180 Miss. 350, 176 So. 395 (1942) (assumption of risk doctrine is in full force in Mississippi except as between master and servant).

It was accordingly incumbent upon plaintiff to show, by a preponderance of the evidence, that the latter series of falls was the proximate cause of his injury.⁷ If the plaintiff fails to produce sufficient evidence to warrant a reasonable jury finding in his favor, then it is the duty of the court to give an instructed verdict for defendant.⁸ Mississippi has rejected the "scintilla" rule of evidence, usually adhering to what is commonly called the "plaintiff's-evidence" rule:⁹ If the plaintiff's evidence, taken alone and considered as undisputed, does not reasonably establish his case, a verdict should be directed for the defendant.¹⁰

The doctor testified in the present case that the injury was the probable result of repeated trauma, but did not state, nor did he deny, that the later falls had any substantial effect on the injury. Where an injury might well have resulted from one of many causes, it is incumbent upon plaintiff to produce evidence which will exclude by a preponderance the operation of those causes for which defendant is under no legal obligation.¹¹ Nor can a court resort to surmise or conjecture in reaching its decision.¹²

Thus upon the evidence of the instant case the only rationale by which the defendant could be found liable would be to consider the falls as two separate groups. The court cited favorably *Bufkin v. Louisville & N. R. Company*,¹³ which stated the rule that consecutive wrongs done by independent agents cannot be conjoined to increase or enlarge the responsibilities of one of them. There defendant's train was running at an illegal rate of speed when a passenger, in an effort to catch the train, ran against plaintiff. This caused plaintiff to fall against the train, so that the car struck him, knocked him down, and injured his leg. The court refused to allow recovery.

However, the facts of the Bufkin case being so dissimilar to the one under consideration, the two might well be distinguished. In the former there was a third person tort-feasor, against whom plaintiff would have recourse. There too the cause of the injury was mis-feasance as contrasted with non-feasance in *Blizzard v. Fitzsimmons*. The more generally accepted doctrine holds that "The question of remote and proximate causes, in a case where two distinct, successive causes, unrelated in their operation, conjoin to produce an injury, is one of law for the court and not of

⁷Kress v. Sharp, 156 Miss. 693, 126 So. 650 (1930).

⁸Gow Co. v. Hunter, 174 Miss. 896, 168 So. 264 (1942) (where facts are undisputed, but reasonable minds may draw different inferences as to negligence therefrom, solution of issue of negligence should be submitted to jury); *Magers v. Okolona, Houston & Calhoun City R. Co.*, 174 Miss. 860, 165 So. 416 (1942); *Bridges v. Jackson Electric Ry., Light & Power Co.*, 86 Miss. 584, 38 So. 788 (1905); 9 WIGMORE, EVIDENCE (3d ed. 1940) § 2494 (advocates use of the test, "Are there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question on which the proponent has the burden of persuading the jury?").

⁹Thomas v. Williamson, 185 Miss. 83, 187 So. 220 (1939); *Y. & M. V. R. Co. v. Laurensdorf*, 180 Miss. 426, 177 So. 50, 178 So. 80 (1938).

¹⁰See Sanders, *When May the Court Direct a Verdict in Mississippi?* (1940) 12 Miss. L. J. 350.

¹¹Prest-O-Lite Co. v. Skeel, 182 Ind. 593, 106 N. E. 365 (1914); BAILEY, PERSONAL INJURIES (2d ed. 1912) 148.

¹²Gypsy Oil Co. v. Ginn, 152 Okla. 30, 3 P. (2d) 714 (1931).

¹³161 Miss. 594, 137 So. 517 (1931).

fact for the determination of the jury."¹⁴ It would seem that the present case would not come within this rule, as manifestly the series of falls, whether considered separately or as in two groups, are not unrelated in their operation.

Proximate cause may be inferred from circumstantial evidence, if substantial, and, where there might reasonably be different conclusions drawn therefrom, a question of fact is presented for the jury.¹⁵ In the principal case it would seem that there was sufficient circumstantial evidence for reasonable minds to reach different conclusions, either about the cause of the injury, or about whether aggravation of the injury was occasioned by defendant's negligence.

Blizzard v. Fitzsimmons perhaps represents additional judicial control over the administration of Mississippi's Contributory Negligence Statute,¹⁶ But whatever its final interpretation, the decision would appear to be unduly strict upon the plaintiff's first burden of proof, his "duty of passing the judge."

Joe Dale.

¹⁴*Missouri Pacific Railway Co. v. Columbia*, 65 Kan. 390, 69 P. 338 (1902); *Atlantic Coast Line R. Co. v. Webb*, 112 Fla. 449, 150 So. 741 (1933) (where two distinct causes of injury or damage are successive and unrelated in operation, they cannot be concurrent, one must be proximate and other the remote cause, and law will regard proximate as efficient and responsible cause disregarding remote cause); *Herr v. City of Lebanon*, 149 Pa. 390, 11 A. 627 (1900).

¹⁵*Mathews v. Ala. Great Southern R. Co.*, 200 Ala. 251, 76 So. 17 (1917); *Flagstaff v. Gomez*, 23 Ariz. 184, 202 P. 401 (1921).

¹⁶*Miss. CODE ANN.* (1930) §§ 511, 512, see *Malone*, Book Review (1937) 9 *Miss. L. J.* 252; *NOTES* (1938) 10 *Miss. L. J.* 175, 176; (1936) 8 *Miss. L. J.* 214.

MARRIAGE—EVIDENTIAL EFFECT OF PRESUMPTION OF SPOUSE'S DEATH
AFTER RETURN FROM SEVEN YEARS' ABSENCE UPON SUBSEQUENTLY
CONTRACTED MARRIAGE

A in July, 1912, married B, who shortly thereafter left her and went to Arkansas. A did not know of B's whereabouts nor did any of B's relatives; however, one of his sisters had heard from a postmaster in Arkansas that B had been drowned. No divorce was granted to either A or B. In March, 1935, A married C, who shortly thereafter died, leaving an insurance policy for \$200 payable to his beneficiary, his wife being designated on the back. Beneficiaries could only be persons related to the insured, either by blood, within the fourth degree, or by marriage, or persons upon whom the insured was wholly dependent for a living. A claims the policy as C's wife, but since B was shown at the trial to be alive, the heirs at law of C assert that A's second marriage to C is void. *Held*: For C's heirs at law. The common law and statutory rule that a husband or wife who has been absent and unheard of for seven years is presumed to be dead is a presumption rebuttable by proof that the absent spouse is alive. Here A's attempted marriage to C is void *ab initio*, the only effect of the statute being to exempt A from criminal prosecution. *Frank v. Frank*, —Miss.—, 10 So. (2d) 839 (1942).

The history of the rule applied in this case is interesting. The origin of the crime of bigamy lies in the canon law, where it was not only bigamous to have more than one husband or wife at one time, but even a widow or widower was also considered guilty of the crime when he remarried.¹ Polygamy did not become a civil offense in England until 1604 under the reign of James I.² The statute provided that persons who have more than one spouse simultaneously shall be guilty of bigamy, except where the first spouse of the remarrying one shall have absented himself for seven years and during that time was not known to have been alive by the other.³ The rule thus began under conditions inconsistent with those of today, and is incongruous with our more modern ideas of marriage relations and of divorce. It is primarily a religious outgrowth, rather than a civil rule from which the rights of persons and property are determined. The Louisiana law on putative marriages as developed from the civil law of Spain and France is far more humane and rational.⁴

The majority opinion justified its decision on the ground that to have held otherwise would have violated the Mississippi seven-year statute.⁵ On the contrary

¹ Bishop, *Marriage & Divorce* (1864), § 296.

² Stat. 1 Jac. 1, c. 11 (1604). See 1 Bishop, *op. cit.*, § 297.

³ 1 Bishop, *op. cit.*, § 297.

⁴ A putative marriage under articles 117 and 118 of the Louisiana Civil Code, although declared null and void, produces all the civil effects of a legal marriage as it relates to the parties and their children, providing the marriage was made in good faith—"That is, whenever the parties have actually honestly and reasonably believed they were entitled to contract marriage then the code says that the marriage is to be regarded as legal up to the time it is judicially declared illegal, and produces all the effects of a legal marriage up to this time." Saunders, *Lectures on the Civil Code* (1925), p. 32.

⁵ "Any person who shall remain beyond the sea, or absent himself from this state, or conceal himself in this state for seven years successively without being heard of, shall be presumed to be dead in any case where his death shall come in question, unless proof be made that he was alive within that time; but any property or estate recovered in any such case shall be restored to the person evicted or deprived thereof, if in a subsequent action, it shall be proved that the person presumed to be dead is living." MISS. CODE ANN. (1930) § 1537.

a holding of this type seems to violate the language of the statute, when it is stripped of its ecclesiastical background. The statute reads ". . . shall be presumed dead in any case where his death shall come into question, unless proof be made that he was alive within that time." It seems that once action has been allowed by the statute on the presumption, the courts should be estopped from denying the validity of such when it comes to light again subsequently.

The purpose of the statute does not seem to be to act as a retroactive law in regard to changes in position made in reliance on the presumption, except in a case where the person presumed to be dead desires to reclaim his property. It is not inequitable that such persons be allowed to reclaim that which is theirs and which never actually belonged to another except by operation of the statute; but it is inequitable that persons relying on the statutory presumption over a period of years should have their lives ruined by the return of an irresponsible spouse.

However, the holding of the Supreme Court is technically correct; the strict common law rule still holds in some states.⁶ The majority of the states which have had experience with this type situation have statutes controlling the point and as a rule hold the subsequent marriage to be merely voidable and in effect until dissolved by court decree.⁷ New York, however, has recently changed its policy and now allows the deserted spouse to invalidate the prior marriage.⁸ Georgia has twice held, on common law principles, that the subsequent marriage was not void unless action were brought for this purpose.⁹

Harper v. Fears,¹⁰ which was discussed in both the majority and dissenting opinions, is the only Mississippi case directly in point. The plaintiff, Mrs. Harper, was married to James Fears in 1907. They separated and in 1911 the plaintiff heard by telegram from his sister that he was dead. Not having heard from him since 1909 and relying on truthfulness of the telegram, she remarried in 1917. She then divorced her second husband and married Harper. About one year after the plaintiff's first remarriage James Fears married Mrs. Bell Fears, the defendant. Until his actual death in 1932 Mrs. Harper did not know that James had been alive during the preceding period. In a dispute over his estate, the defendant, Bell Fears, prevailed. As Smith, C. J., says, *Harper v. Fears* was decided on the presumption of divorce and the estoppel of the wife by her own remarriage to challenge the second marriage of her former husband.¹¹ But the *ratio decidendi* of *Harper v. Fears* seems to accord with Judge Griffith's interpretation in his dissenting opinion in the *Frank* Case: namely, that such a marriage cannot be attacked, regardless of other considerations.¹²

⁶Note (1934) 93 A. L. R. 345 *et seq.*

⁷Note (1934) 93 A. L. R. 347 *et seq.*

⁸New York Domestic Relations Law of 1909, Consolidated Laws c. 14 § § 6 and 7 as amended by Chapter 297, Laws of 1922, § § 7 and 8. See *Hatfield v. United States*, 127 F. (2d) 575, 577 (C. C. A. 2nd, 1942).

⁹*Grand Lodge, K. P. v. Barnard*, 9 Ga. App. 71, 70 S. E. 678 (1911); *Eubanks v. Banks*, 34 Ga. 407 (1866); See Note (1934) 93 A. L. R. 345, 347.

¹⁰168 Miss. 505, 151 So. 745, 93 A. L. R. 341, 347 (1934). Oddly enough, this case was classified in Note (1934) 93 A. L. R. 345, 347 as being among the decisions in states refusing to follow the common law rule.

¹¹*Harper v. Fears*, 168 Miss. 505, 151 So. 745 (1934).

¹²"If the law itself acts upon the presumption, we see no reason why a party acting upon it in good faith, by contracting an irrevocable status affecting the honor and legitimacy of other people should not so act and such act be valid."

"Certainly such a person voluntarily absented himself under such conditions,

There is thus established a rule of substantive law, based upon public policy, not a rule of evidence.

One Mississippi commentator holds our law on the matter to be as stated in the majority opinion.¹³ But Mississippi has always been zealous in protecting marriage.¹⁴ Although there is dictum in one old criminal case to the effect that the subsequent marriage would be invalid upon production of proof that the first husband was alive,¹⁵ our courts have gone to every extreme in order to uphold the validity of marriages entered into in good faith. Presumptions of divorce are indulged in to the greatest possible extent,¹⁶ and the courts have gone so far as to lay down a rule that makes rebuttal of such presumption almost impossible.¹⁷

In *Ellis v. Ellis*¹⁸ an analogous problem was presented, which involved a marriage to an insane person. Such marriages were at common law wholly void, as in the marriage involved in the present case; but the court there held the marriage to be merely *voidable* (as distinguished from void) on the ground that it did not fall into the statutory classification of "void marriages" as provided for in the code.¹⁹ As prior marriages are not classified under these provisions, it would seem that the same rule would apply in the present case as was applied in *Ellis v. Ellis*. Voidable marriages, carrying with them all the effects of a valid marriage until dissolved by the court, are immune from collateral attack after the death of one of the spouses and the children born under the marriage are legitimate. This prevents

and could not complain if, during his absence, his marriage status was dissolved by such act."

"Why should the law permit a person to withdraw himself for a long period, such as seven years, without communication to this family and friend and then by returning to his original surroundings, bastardize innocent children." *Harper v. Fears*, 168 Miss. 505, 513, 151 So. 745 (1934).

¹³*Amis*, Divorce and Separation in Mississippi (1935) Sec. 52 citing "18 R. C. L. 413; *Fenton v. Reid*, 4 Am. Dec. 244; *State v. Patterson*, 38 Am. Dec. 699." This is not necessarily the modern rule as the first citation is an 1802 New York case (4 Johns. 52) and the second 1842 North Carolina case (2 Ired. L. 346). Both of these states now have modern statutes controlling the matter, and the rule as enunciated in these cases is no longer applicable in their respective states.

¹⁴"The law encourages marriage, and the courts have repeatedly announced that the law will presume in favor of marriage and legitimacy, and not concubinage and bastardy. The presumption of innocence is a strong presumption, and throws the protecting arms of the law around innocent children." *Howard v. Kelly*, 11 Miss. 285, 71 So. 391 (1916); See *Powell v. Powell*, 27 Miss. 785 (1854).

¹⁵*Gibson v. State*, 38 Miss. 313 (1860).

¹⁶*Alabama & V. Ry. v. Beardsley*, 79 Miss. 417, 30 So. 660 (1901).

¹⁷Where the code provided that a bill for divorce must be filed in the county in which the complainant resides if the defendant is a non-resident of the state or absent so the process cannot be served and the proof did not show that the first husband was a nonresident, or was absent, the court held that proof that no divorce was granted a remarrying wife in the counties in which she had lived was insufficient to overcome the presumption of divorce. The code [Miss. Code Ann. (1906) Sec. 1677] further provided that where the defendant to a divorce suit resided within the state, the bill must be filed in the county wherein he lives; and the court held that in the absence of proof that the husband did not live outside the state, the presumption of divorce can only be rebutted by showing that no bill had been filed in any county where the defendant might have resided. *Lardner v. Pigford*, 147 Miss. 822, 112 So. 785 (1927), affirming 138 Miss. 471, 103 So. 218 (1925).

¹⁸152 Miss. 836, 119 So. 304 (1928).

¹⁹MISS. CODE ANN. (1906) § § 3232-3233. MISS CODE ANN. (1930) contains the same provisions: namely, that attempted marriages that are incestuous or miscegenative are void.

the injustices of a so-called "void marriage" which is null *ab initio*. Although the Supreme Court in the *Frank Case* did not consider *Ellis v. Ellis* the latter now seems to conflict with the *Frank Case* with reference to voidable as distinguished from "void" marriages.

In the instant decision the court decided a principle of evidence,²⁰ but left a mark far greater on the law of domestic relations in this state. Were this principle of evidence so great that had it been decided otherwise it would have had a controlling effect in the future on other legal doctrines, the court might have been justified in its attitude; but here it was not necessary as a controlling rule of evidence. The court, minimizing the purpose of the statute, decided a rule of evidence as an end instead of a rule of human behavior.²¹ The effect of the decision is, as Judge Griffith stated in his dissenting opinion, to convict several persons of adultery and to bastardize innocent children when they are involved.

If the courts refuse to depart from the common law rule, it would seem that legislation might be advisable in order to insure against such unfortunate results; preferably such marriages should be merely voidable. This would permit considerable flexibility in settling such disputes according to the best interest of the community and the individuals involved.

Irwin Gerald Waterman.

²⁰Wigmore, Evidence (2d ed. 1940) § 2531.

²¹Thayer, A Preliminary Treatise on Evidence At the Common Law (1898) p. 270-276.

The last sentence

The Law School

Plans have been completed for a summer law school commencing June 2nd and extending into September. This will be a full semester's work of 15 weeks.

The summer school work will be followed by the regular session of 1943-44, which commences September 20th.

The summer term and the regular session which follows will be operated by three professors. It is expected the student attendance on account of war conditions necessarily will be small and this gives rise to the reduction in the size of the teaching staff.

This same policy is being followed by law schools throughout the country. There will, however, be no deviation from the quality of the work done by the school. Those expecting to do summer school, as well as next session work, should get in touch with Judge T. C. Kimbrough, dean of the school, as early as possible.

The faculty for summer and next session work will be composed of Professors L. C. Andrews and Wm. N. Ethridge, Jr., and Dean T. C. Kimbrough.

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